

ERRATA

PART I

- P. 5 Above S 1. Insert Preliminary.
P. 46 S 33 A. 5 (a) (ii) For of any person
read of any male person.
P. 49 S. 38. For among his surviving *read*
among all his surviving.
P. 63 Schedule III. For 116, 119, *read*
116, 117, 119.
P. 392 S. 157. For to pay the specific *read*
to pay both the specific.
P. 801 S. 372 (1) (b). For limits of jurisdiction
read limits of the jurisdiction.
P. 802 S. 372 (3). For or respect of portions
read or in respect portions.

Statement of Objects and Reasons

The object of this Bill is to consolidate the Indian law relating to succession. The separate existence on the statute book of a number of large and important enactments renders the present law difficult of ascertainment and there is, therefore, every justification for an attempt to consolidate it.

The Bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made. The details of the Bill are more particularly discussed in the attached Notes on Clauses.

Notes on Clauses

Clause 2. The General Clauses Act, 1897 (X of 1897), will apply to the Bill. The definitions therefore of "person," "year," "month," "immoveable property," "moveable property," "Local Government" and "High Court" are unnecessary and are omitted. The definitions of "British India" and "District Judge" have also been omitted as the definitions in the General Clauses Act appear more suitable and do not change the substance of the law. The definition of "province" has been omitted, as, notwithstanding the ruling in 12 W. R. 424, it does not appear that the omission will lead to any administrative inconvenience. The definition of "minor" and "minority" is adopted from section 3 of the Probate and Administration Act, 1881 (V of 1881), and seems appropriate to the consolidated Bill. No change has been made in the other definitions which are taken from Act X of 1865, though one or two could perhaps have been more suitably worded. The definition of "Indian Christian" is taken from the Native Christian Administration of Estates Act 1901 (VII of 1901) except that the phrase "Indian Christian" has been used instead of "Native Christian" following the more modern practice in this respect.

Clause 3. See S. 3 n. 1.

Clause 4. The second proviso to this clause is taken from the last paragraph of section 2 of the Married Women's Property Act 1874 (III of 1874). This provision comes in appropriately here and it is proposed to repeal the corresponding provision in the Act in question.

Clause 5. It is well settled that the word "Hindu" in section 331 of the Indian Succession Act, 1865, and in section 2 of the Probate and Administration Act, 1881, includes Jains and Sikhs (cf I L R 31 Cal 11, etc.) and as the Hindu Wills Act, 1870, which the Bill consolidates, makes special mention of Sikhs and Jains they are separately mentioned throughout the Bill. This and other similar sections may need to be qualified if and when the Special Marriage (Amendment) Bill, which has just been passed by the Indian Legislature, becomes law.

Clauses 6 to 20 deal with domicile and are reproductions of the corresponding sections of the Act of 1865. They are for the most part general rules which might well be applicable to all classes, but clause 5 reproducing section 331 of the Act of 1865, excludes their application in the case of Hindus, Muhammadans, Buddhists, Sikhs and Jains.

Part III deals with intestate succession and is based on the appropriate provisions of the Indian Succession Act, 1865 (X of 1865) and the Parsi Succession Act, 1865 (XXI of 1865)

Clauses 46 to 52 and Schedule II contain special rules as to intestate succession among Parsis

Clause 53 The proviso to this clause gives effect to one of the provisions of section 8 of the Parsi Succession Act and taken together with the preceding clauses reproduces the whole of that Act which it is therefore proposed to repeal

Part IV deals with testamentary succession

Clause 56, read with Schedule III, reproduces those provisions of the Hindu Wills Act, 1870 (XXI of 1870), which relate to testamentary succession Section 187 of the Indian Succession Act, 1865 (X of 1865), as applied by the Hindu Wills Act, has been dealt with in another part of the Bill and will be dealt with under the appropriate clause

Part V. See above S 192

Clause 196 This clause is taken from section 23 of the Succession Certificate Act, 1889 (VII of 1889), but which, as it limits the power of the curator, appropriately falls in this Part of the consolidated Bill

Clause 197. The words "moveable and "immoveable" have been substituted for the words "personal" and "real"

Clause 198 The words 'High Court' have been substituted here and in other places in this Part where they occur for the words 'Court of Sadar Diwani Adalat'

Clauses 204, 205 and 206. These clauses have been recast as they are drawn in a form which is no longer employed in modern Acts

Part VI See above S 211

Clause 210. See below S 212

Clause 211. See below S 213

Clause 212 reproduces the provisions of section 4 of the Succession Certificate Act 1889 (VII of 1889)

Clause 213 See below S 215

With reference to this part of the Bill, it will be observed that the arrangement of the clauses brings out very clearly the anomalous position in the Indian law with regard to the requirements of proof of representative title to the property of a deceased person

Part VII. See above S 217

Clause 215 reproduces section 179 of Act X of 1865 subject to the proviso in the case of survivorship for those classes of persons who are provided for by section 4 of Act V of 1891

Clause 218 As in the case of Hindus, Muhammadans Buddhists Sikhs Jains, and exempted persons, probate can be granted to a married woman without the consent of her husband, the provisions of section 8 of Act V of 1891 are here incorporated with those of section 183 of Act X of 1865

Clause 223 Here, again, section 13 of Act V of 1881 is incorporated with section 189 of Act X of 1865 for the same reason

Clauses 233 and 234 The right to the grant of administration is dealt with by section 23 of Act V of 1881 and by sections 200 to 207 of Act X of 1865 Clause 233 reproduces the former rule and clause 234 the latter

Clause 239 See under S 241

Clauses 240 and 241 The same remarks apply as in the case of clause 239

Clause 242 See under S 244

Clause 244 Cited under S 246 ✓

Clause 246 The same remarks apply as in the case of clauses 240 and 241

Clause 247 Curiously enough both section 36 of the Act of 1881 and section 220 of the Act of 1865 used the word 'attorney' It would appear a drafting slip in the Act of 1881 and the words "or agent" have been added

Clause 248 Cited under S 250

Clause 262 The proviso incorporates the provisions of section 2 of the Act of 1881

Clause 267 Cited under S 269

Clause 274 The law to be reproduced is contained in section 244 of the Act of 1865 and section 62 of the Act of 1881 The latter Act however, contains the additional words 'or for letters of administration with will annexed and also the words 'or in the cases mentioned in sections 24, 25 and 26 a copy, draft or statement of the contents thereof The provisions of the Act of 1881 seem necessary to complete the law and they have been adopted *mutatis mutandis* in the clause

Clause 275 Similarly the words 'copy or draft' which only occur in section 63 of the Act of 1881 have been adopted

Clause 276 Cited under S 278

Clause 289 Cited under S 291

Clause 295 Cited under S 296

Clause 299 Cited under S 300

Clause 302 This clause is necessary as the provisions of the Act of 1865 relating to 'executors of their own wrong' were not included in the Act of 1881

Clause 305 The wording of S 83 of the Act of 1881 has been adopted It is more consonance with the language of the Indian draftsman and involves no change of substance

Clause 307. Sub section (2) reproduces the provisions of section 90 of the Act of 1881 which were inserted in that Act by section 14 of the Act VI of 1890

Clause 311 The words "in the absence of any directions to the contrary in the will or grant of letters of administration" which occur in section 93 of the Act of 1881 have been adopted in the clause as they appear to state the law more accurately

Clause 316 Cited under S 316

Clause 324 Cited under S 324

Clause 327 Cited in S 327, n 1

Clause 332 This corresponds to section 292 of the Act of 1865 which is the first section in Part XXXV of that Act which is headed 'Of the Executor's Assent to a Legacy' This at once raises the question of section 148 of the Act of 1881 That section runs as follows 'In Chapters VIII IX X, and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed' These Chapters deal with (1) the executor's assent to a legacy, (2) the payment and apportionment of annuities, (3) the investment of funds to provide for legacies and (4) the refunding of legacies They correspond to Parts XXXV, XXXVI XXXVII and XXXIX of the Act of 1865 but that Act contains no specific provision of the kind contained in section 148 To take the first question the executor's assent to a legacy, it would seem that the executor and the administrator with the will annexed are in exactly the same position The reason the assent of the executor is necessary is that the estate of the deceased is vested in the executor and the legatee's title to the legacies is only inchoate Equally this is true of the administrator with the will annexed It would seem therefore that under the Indian Succession Act the assent of an administrator with the will annexed to a legacy is probably necessary though no specific provision exists It is well settled in England that this is so, see *Doe versus Mobberly*, 6 C and P 126, *Broker versus Charter Cro Eliz* 92 Similarly the other provisions specifically mentioned in section 148 appear to be applicable to cases under the Indian Succession Act The Bill has been drafted to give effect to this view by specific amendments

Clause 345 Cited under S 345

Clause 360 Cited under S 360

Clause 370 This clause is based on section 1 (4) of the Succession Certificate Act 1889 (VII of 1889) with the exception in the proviso which is based on section 5 of Act VII of 1901 The rest cited under S 370, n 4

Clause 371 In this clause and the rest of this Part, the words 'District Judge' have been used in order to assimilate this Part to the rest of the Bill

Report of the Joint Committee

The following Report of the Joint Committee on the Bill to consolidate the law applicable to intestate and testamentary succession in British India was presented to the Council of State on the 25th August, 1915 —

We, the undersigned, Members of the Joint Committee to which the Bill to consolidate the law applicable to intestate and testamentary succession in British India was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit this our Report with the Bill as amended by us annexed thereto

Paper No I
Paper No II
Paper No III
Paper No IV
Paper No V

The Committee met on 30th June, the Honourable Sir Henry Moncrieff Smith, President of the Council of State, being elected Chairman. Further sittings were held on the 1st, 3rd and 4th July, the following members being present in addition to the Chairman :—

The Honourable Sir NARASIMHA SARMA,
 The Honourable Sir ALEXANDER MUDDIMAN,
 The Honourable Saiyid RAZA ALI,
 The Honourable Sir DEVA PRASAD SARVADHIKARY,
 The Honourable Sir ARTHUR FROOM,
 Rai Sahib HARBILAS SARDA,
 Mr. K. C. NEOGY, and
 Mr. ABDUL HAYE.

A final meeting was held on the 17th August to consider the redraft of the Bill at which Diwan Bahadur M. Ramachandra Rao also was present.

2. Many of the opinions elicited on circulation of the Bill involve amendments of the existing law and this, in our opinion, is outside the scope of the Bill which has been referred to us. The Bill is purely a consolidating Bill and some of those who have submitted opinions have clearly treated it as such, and it would not be advisable, or within our competence, for us to consider amendments of the existing law in connection therewith. The papers which we have considered, however, indicate that there is a considerable volume of opinion in favour of amending the existing law and we invite the attention of the Government to this fact.

3. Suggestions have been made for the inclusion of undermentioned enactments in this Bill, but for the reasons hereunder given we are not of opinion that these should be consolidated with the present Bill.

The Hindu Disposition of Property Act, 1916—As only a part of the Act relates to succession, the consolidation of this portion alone would not simplify the Statute Book, as section 5 of the Act cannot suitably be included in the amending Bill, and this section requires that the provisions of the Act relating to succession should continue to be enacted therein.

The Special Marriages (Amendment) Act, 1932—The principal Act is of special application and it is advisable that even the rules of succession applicable to persons who marry under that Act should be enacted in the special Act which deals with the status of such persons.

The Wills Act, 1838, and the Inheritance Act, 1839.—These relate only to wills and intestacies occurring before the 1st January, 1866, and in all probability will be spent at an early date.

The Legal Representative Suits Act, 1855.—This cannot wholly be included in the consolidating Bill; the provisions of the Act are substantially reproduced in the Bill, but we have decided *ex majori cautela* not to repeal the provisions of this Act.

We agree with Statute Law Revision Committee that it would be difficult to incorporate the provisions of the *Indian Fatal Accidents Act, 1855*, in the consolidated Bill.

The Oudh Estates Act, 1869, and the Malabar Wills Act, 1893.—These are enactments of local interest which would not properly find a place in a general consolidating enactment. This applies also to Bombay Regulation VIII of 1827.

4 The following NOTES ON CLAUSES explain the amendments which we have made in the Bill.

Clause 2—It has been pointed out that the omission of the definition of "province" given in the Indian Succession Act, 1865 (and the consequent application of the definition given in the General Clauses Act, 1897) does alter the existing law. We have, therefore, inserted in new clause (g) the original definition.

Clause 3 (1)—This has been brought into line with the provisions of section 332 of the Indian Succession Act, 1865, which operate from the date stated.

New Part III.—Original clauses 54 and 55 have been taken out of original Part IV and, with original clause 4, formed into a new Part dealing with the effect of marriage on rights of succession.

Part IV, Clauses 23 to 28—We have taken the clauses relating to consanguinity from original Part III (intestate succession) and formed them into a separate Part, new Part IV, as in Act X of 1865. The operation of these clauses is not limited to cases of intestate succession.

Clause 35—We are of opinion that the provisions relating to the rights of a widower are more appropriately inserted here.

Clause 38—Illustration (c) has been transferred to clause 40 as illustration (d), as the illustration properly relates to that clause.

Clause 39—We have amended this clause to express the meaning more clearly.

Clause 111—We have omitted *Illustration (b)* as it might give the impression that a child in the womb is excluded which is not the existing law.

Parts VII and VIII—The amendments made are purely drafting amendments. Original clause 215 has been inserted in Part VIII as clause 211 and original clause 293 as clause 216 as they deal with the question of representative title. In clause 214 (1) (a) and in the heading to the Part we have added the words "on succession" as a majority of us are of opinion that the addition is necessary to make it clear that no change has been made in the existing law.

Clause 217—We have amended the clause to make it clear that it refers to intestate as well as testamentary succession.

Part IX, Chapter 1—We have re-arranged the provisions in the following order: (1) administration in case of intestacy, (2) probate, (3) letters of administration.

Clause 245—The wording of section 32 of Act V of 1831 has been followed as this covers both cases.

Clause 247 (2)—The word "truly" has been added to remove any doubt as to what is clearly the intention of the provision.

Clause 278 (1) (c) —The wording has been assimilated to that in clause 274 (2) (a)

Clause 291 —In the case of probate a bond can only be demanded from the special classes to whom Act V of 1881 applies

Clause 302 (of the original Bill) —We have omitted this clause as the Chapter enunciates general principles of law which *suo vigore* apply to Hindus and the other specified communities

Clauses 322 and 352 —The words added have been taken from sections 103 and 131 of Act V of 1881 ✓

Clause 303 —The words omitted are merely explanatory and are not to be found in section 104 of Act V of 1881

Clause 332 —An administrator is not mentioned in section 292 of Act X of 1865 but for the reasons given in the note on this clause attached to the original Bill we are of opinion that an administrator should also be mentioned here

Schedule III —The necessary omission in section 70 has been made in view of the first proviso contained in section 3 of Act XXI of 1870 We have excluded from this Schedule section 72 which deals with revocation of privileged wills, as section 65 which permits of privileged wills being made is not included The inclusion then of section 59 of the Indian Succession Act 1855 (now clause 72 of the Bill in section 2 of the Hindu Wills Act 1870) was meaningless as section 52 of the former Act was not also included

5 The publication ordered by the Council has been made as follows —

In English

<i>Gazette</i>	<i>Date</i>
Gazette of India	4 8 23
Fort Saint George Gazette	21 8 23
Bombay Government Gazette	4 10 23
Calcutta Gazette	5 9 23
United Provinces Gazette	25-8 23
Punjab Government Gazette	28 9 23
Burma Gazette	15 9 23
Central Provinces Gazette	23 6 23
Assam Gazette	15 8 23
Bihar and Orissa Gazette	5 9 23
Coorg District Gazette	1 9 23
Sindh Official Gazette	11 10 23
North West Frontier Gazette	12 10 23

In the Vernacular

<i>Province</i>	<i>Language</i>	<i>Date</i>
Madras	Tamil	22 4 24
	Telugu	12 8 24
	Hindustani	11 3 24
	Kanarese	30 9 24
	Malayalam	14 10-24
Burma	Oriya	15 7 24
	Burmese	24 11 23

6. We think that the Bill has not been so altered as to require re-publication. We do not suggest that the final passing of the Bill should be delayed till an amending Bill generally overhauling the law of succession has been introduced and taken through the Legislature. This would very considerably delay the passage of the present Bill, which as a purely consolidating measure should prove of great utility, and we recommend that it be passed as now amended.

H MONCRIEFF SMITH

B N. SARMA

A P. MUDDIMAN

DEVAPRASAD SARVADHIKARY.

RAZA ALI

A H. FROMM

HARBILAS SARDA

K C NEOGY

ABDUL HAYE

M RAMACHANDRA RAO

Th 21st August, 1925*

COMPARATIVE TABLES.

SHOWING DISTRIBUTION IN THE NEW ACT OF THE SECTIONS
OF THE REPEALED ACTS.

(I) The Succession Property Protection Act (XIX of 1841)

Section of Act XIX of 1841	Section of the New Act.	Section of Act XIX of 1841	Section of the New Act.
1	192 (1)	12	203
2	192 (2)	13	204
3	193	14	205
4	194	15	206
5	195	16	207
6	196	17	208
7	198	18	209
8	199	19	210
9	200	20	Repealed by Act VIII of 1855
10	201		
11	202		

(II) The Indian Succession Act (X of 1865.)

Section of Act X of 1865	Section of the New Act.	Section of Act X of 1865	Section of the New Act.
Part I Preliminary		27	33
1	1	28	31
2	29 (2), 58 (2), 217	Part V.—Of the Distribution of an Intes- tate's Property.	
3	2	(a) Where he has left lineal descen- dants	
4	20	29	36
Part II.—Of Domicile		30	37
5	5	31	38
6	6	32	39
7	7	33	40
8	8	(b) Where the Intestate has no lineal descendants	
9	9	34	41
10	10	35	42
11	11	36	43
12	12	37	44
13	13	38	45
14	14	39	46
15	15	40	47
16	16	41	48
17	17	42	49
18	18	Part VI.—Of the Effect of Marriage and Marriage settlements on Property.	
19	19	43	35
Part III.—Of Consanguinity.		44	21
20	24	45	22
21	25	Part VII.—Of Wills and Codicils.	
22	26	46	59
23	27	47	60
24	28	48	61
Part IV.—Intestacy.			
25	30		
26	32		

6 We think that the Bill has not been so altered as to require re publication. We do not suggest that the final passing of the Bill should be delayed till an amending Bill generally overhauling the law of succession has been introduced and taken through the Legislature. This would very considerably delay the passage of the present Bill, which as a purely consolidating measure should prove of great utility and we recommend that it be passed as now amended.

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9	9	34	41
10	10	35	42
11	11	36	43
12	12	37	44
13	13	38	45
14	14	39	46
15	15	40	47
16	16	41	48
17	17	42	49
18	18	Part VI —Of the Effect of Marriage and Marriage settlements on Property	
19	19	43	50
Part III —Of Consanguinity		44	51
20	24	45	52
21	25	Part VII —Of Wills and Codicils	
22	26	46	53
23	27	47	54
24	28	48	55
Part IV.—Intestacy			
25	30		
26	32		

Section of Act X of 1865	Section of the New Act	Section of Act X of 1865	Section of the New Act
49	62	102	115
Part VIII—Of the Execution of Un privileged Wills		103	116
50	63	104	117
51	64	105	118
Part IX—Of Privileged Wills		106	119
52	65	107	120
53	66	108	121
Part X—Of the Attestation, Revocation Alteration and Revival of Wills		Part XIV—Of Onerous Bequests	
54	67	109	122
55	68	110	123
56	69	Part XV—Of Contingent Bequests	
57	70	111	124
58	71	112	125
59	72	Part XVI—Of Conditional Bequests	
60	73	113	126
Part XI—Of the Construction of Wills		114	127
61	74	115	128
62	75	116	129
63	76	117	130
64	77	118	131
65	78	119	132
66	79	120	133
67	80	121	134
68	81	122	135
69	82	123	136
70	83	124	137
71	84	Part XVII—Of Bequest with Directions as to Application or Enjoyment	
72	85	125	138
73	86	126	139
74	87	127	140
75	88	Part XVIII—Of Bequest to an Executor	
76	89	128	141
77	90	Part XIX—Of Specific Legacies	
78	91	129	142
79	92	130	143
80	93	131	144
81	94	132	145
82	95	133	146
83	96	134	147
84	97	135	148
85	98	136	149
86	99	Part XX—Of Demonstrative Legacies	
87	100	137	150
88	101	138	151
89	102	Part XXI—Of Ademption of Legacies	
90	103	139	152
91	104	140	153
92	105	141	154
93	106	142	155
94	107	143	156
95	108	144	157
96	109	145	158
97	110	146	159
98	111	147	160
Part XII—Of Void Bequests		148	161
99	112	149	162
100	113	150	163
101	114	151	164

Section of Act X of 1865	Section of the New Act	Section of Act X of 1865.	Section of the New Act.
152	165	196	232
153	166	197	233
Part XXII—Of the Payment of Liabilities in respect of the Subject of a Bequest.		198	234
154	167	199	235
155	168	200	219
156	169	201	219 (a)
157	170	202	219 (b)
Part XXIII—Of Bequests of Things described in General Terms.		203	219 (c)
158	171	204	219 (d)
Part XXIV—Of Bequests of the Interest or Produce of a Fund		205	219 (e)
159	172	206	219 (f)
Part XXV—Of Bequests of Annuities.		207	219 (g)
160	173	Part XXX—Of Limited Grants.	
161	174	(a) <i>Grants limited in duration</i>	
162	175	208	237
163	176	209	238
Part XXVI—Of Legacies to Creditors and Portioners		210	239
164	177	211	240
165	178	(b) <i>Grants for the use and benefit of others having right</i>	
166	179	212	241
Part XXVII—Of Election.		213	242
167	180	214	243
168	181	215	244
169	182	216	245
170	183	217	246
171	184	218	247
172	{ 185	(c) <i>For Special purposes.</i>	
	{ 186	219	248
173	187	220	249
174	188 (1)	221	250
175	188 (2)	222	251
176	189	223	252
177	190	224	253
Part XXVIII—Of Gifts in Contemplation of Death.		225	254
178	191	(d) <i>Grants with exception</i>	
Part XXIX—Of Grant of Probate and Letters of Administration.		226	255
179	211	227	256
180	228	(e) <i>Grants of the rest.</i>	
181	222 (1)	228	257
182	222 (2)	(f) <i>Grants of effects unadministered</i>	
183	223	229	258
184	224	230	259
185	225	231	260
186	226	(g) <i>Alteration in grants</i>	
187	213	232	261
188	227	233	262
189	236	(h) <i>Revocation of grants</i>	
190	212	234	263
191	220	Part XXXI—of the Practice in granting and revoking Probate and Letters of Administration.	
192	221	235	264
193	229	235A	265
194	230	236	266
195	231	237	267
		238	268
		239	269
		240	270
		241	271

Section of Act X of 1865	Section of the New Act	Section of Act X of 1865	Section of the New Act
241A	272	285	325
242	273	286	326
242A	274	287	327
243	275	288	328
244	276	289	329
245	277	290	330
246	278	291	331
246A	279	Part XXXV—On the Executors Assent to a Legacy	
247	280	292	332
248	281	293	333
249	282	294	334
250	283	295	335
251	284 (1, 2, 3)	296	336
252	284 (4), Sch V	297	337
253	285	Part XXXVI—Of the Payment and Apportionment of Annuities	
253A	286	298	338
253B	287	299	339
253C	288	300	340
254	289, Sch VI	Part XXXVII—Of the Investment of Funds to provide for Legacies	
255	290	301	341
256	291	302	342
257	292	303	343
258	293	304	344
259	294	305	345
260	216	306	346
261	295	307	347
262	297	308	348
263	299	Part XXXVIII—Of the Produce and Interest of Legacies	
264	300	309	349
264A	301	310	350
264B	302	311	351
Part XXXII—of Executors of their own Wrong		312	352
265	303	313	353
266	304	314	354
Part XXXIII—of the Powers of an Executor or Administrator		315	355
267	305	Part XXXIX—Of the Refunding of Legacies	
268	306	316	356
269	307	317	357
269A	308	318	358
269B	309	319	359
270	310	320	360
271	311	321	361
272	312	322	362
273	313	323	363
274	314	324	364
275	315	325	365
Part XXXIV—of the Duties of an Executor or Administrator		326	366
276	316	326A	367
277	317	Part XL—Of the Liability of an Executor or Administrator for Devastation	
277A	318	327	368
278	319	328	369
279	320		
280	321		
281	322		
282	323		
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LIST OF ABBREVIATIONS

SPECIALLY USED IN THIS BOOK

B.—	Bythewood, Precedents.
H.—	Halsbury, Laws of England.
H. & J.—	Haynes and Jarman, Forms of Wills
Ingpen—	On Executors.
J.—	Jarman on Wills 6th Ed, unless otherwise indicated.
K.—	Henderson's Succession Act, edited by Kinney.
M.—	Mazumdar, Hindu Wills Act, 2nd Ed
Mortimer.—	Mortimer, Probate Practice, 2nd Ed.
N. C. A.—	Native Christians Act.
P (in thick type)—	Probate and Administration Act
P. I. S. A.—	Parsi Intestate Succession Act
P. P. A.—	Succession Property Protection Act.
S. (in thick type)—	Succession Act
S. C do —	Succession Certificate Act
S R.—	Succession Act of 1865, by Sanjiva Row
Stokes.—	Anglo-Indian Codes
T.—	Theobald on Wills 7 Ed, unless otherwise indicated
T P. A —	Transfer of Property Act
Tr. & C.—	Tristram & Coote's Probate Practice
W.—	Williams on Executor 12 Ed., unless otherwise indicated.
W. & T. L. C.—	White & Tudor, Leading Cases.
Walker.—	On Executors
Wigram.—	Wigram on Extrinsic Evidence

STATEMENT OF REPEALS AND AMENDMENTS

S. 2 Amended	...	...	Act XVIII of 1929, s. 2.
S. 10 do	...	...	Act X of 1927, s. 2 and Sch. I.
S. 33 do	...	...	Act XL of 1926, s. 2.
S. 33A Inserted	...	...	Do. do. s. 3.
S. 57 Amended	...	...	Act XVIII of 1929.
S. 63 do	...	...	Act X of 1927, s. 2 and Sch. I.
S. 65 do	...	...	Do. do. do.
S. 66 do	..	...	Do. do. do.
Ss. 115 and 116 Amended		..	Act XXI of 1929 s. 14.
S. 117 Substituted	...	...	Do. do.
S. 157 Amended	...	...	Act X of 1927, s. 2 and Sch. I.
S. 213 do	...	...	Act XVIII of 1929, s. 4.
S. 223 do	...	...	Act XVIII of 1927, s. 2.
Ss. 223 and 236 Amended		...	Act XVII of 1931.
S. 236 Amended	...	...	Act XVIII of 1927, s. 2.
S. 372 do	...	...	Act XIV of 1928, s. 2.
S. 392 Repealed	...	...	Act XII of 1927, s. 2 and Sch.
Sch. III Amended	...	...	Act XXI of 1929, s. 14
Sch. IX Repealed	...	...	Act XII of 1927, s. 2 and Sch.

ACT No. XXXIX OF 1925.

[PASSED BY THE INDIAN LEGISLATURE]

*(Received the assent of the Governor General on the 30th
September, 1925)*

THE INDIAN SUCCESSION ACT.

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- SCHEDULE I —Table of Consanguinity
- SCHEDULE II —
 - Part I* —Order of next of kin in case of Parsi intestates referred to in section 55 (b)
 - Part II* —Order of next of kin in case of Parsi intestates referred to in section 56
- SCHEDULE III —Provisions of Part VI applicable to certain Wills and Codicils described in section 57
- SCHEDULE IV —Form of Certificate
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The Indian Succession Act.

Being Act XXXIX of 1925.

*(Received the Assent of the Governor General on the 30th
September 1925.)*

**An Act to consolidate the law applicable to intestate
and testamentary succession in British India.**

General Rules of interpretation

1. Statute The main rule of construction is that a Statute should be construed according to the intention of the Legislature (a) The intention is to be ascertained from that which the Legislature has chosen to enact, either in express words or by reasonable and necessary implication (b) The function of the Court is not to say what the Legislature meant but what it has said that it meant (c) It is always dangerous to paraphrase an enactment (d) A Statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant (e) A reasonable construction is to be put upon the Acts of the Legislature Where the words are plain, the Court shall expound them as they stand, (f) and not regard the anomalies that may be produced, unless there be compelling necessity (g) It must be assumed that the Legislature makes no mistakes (h). The Act should be interpreted as a whole and every word should, in the first instance, be given its ordinary meaning (i) The practice of the court cannot justify a construction which is contrary to the wording of the Act (j).

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- (a) *Commissioners &c v Pemsel*, 1891, A C, 531, 543, 61 L J Q B 265
(b) *Salomon v Salomon*, 1897 A C 32, 38, *Nanak v Mehin* 1 A. 487, 496
(c) *Young v Hughes*, 4 H & N (83 4), *Lala Suarj v Golab Chand* 27 C. 724, 755
(d) *Durga v Jewahir* 18 C 23, 30
(e) *Reg v Bishop of Oxford*, 4 Q B D 245 cited in *Alangamanjori v Sonamoni*, 8 C 637 and in *Swaminatha v Vaidyanatha*, 28 M 466, 15 M L

- J 116 F. B., *Moher v Queen Empress*, 21 C 392, 399 400
(f) *Gureebullah v Mohan* 7 C 127, *Lala Suraj v Golab* 27 C 724 756
(g) *Promotho v Kali* 28 C, 744, 747; *Rajib v Lakhan* 27 C 11, 15
(h) *Commissioners &c v Pemsel* 1891 A C. 531
(i) *Pudmanund v Hayes*, 28 C. 733; 5 C. W. N 812 - *Harris v. Brown* 28 C 621, 5 C W N 729
(j) *Balkaran v Gobind*, 12 A 129, 135

word given in the General Clauses Act S 3 (15) appeared more suitable but inserted because that definition involved a change in the substance of the law. The words as defined in the General Clauses Act mean the principal Court of original jurisdiction but do not include the High Court whereas the definition given in the Succession Act of 1865 included the High Court on the original side.

6 (c) Executor The definition is with slight verbal alterations taken from Williams On Executors (a) It will appear from the definition that it is the testator alone who can appoint an executor. A will is the only bed where an executor can be begotten or conceived (b) So if the appointment fails another executor cannot be appointed by the Court though it may appoint an administrator. The appointment by the testator must be by will but it may be express or by necessary implication (c) The executor derives his authority from the will appointing him (d) It is his duty to carry out the provisions of the will and distribute the property among the legatees.

7 Executor and trustee An executor is not a trustee of any part of the testator's estate for any purpose nor is a trustee appointed by will necessarily an executor (e) But a person entrusted with the task of administering the estate after the testator's death e.g., to receive and pay debts of the testator and to get in all the personal estate is an executor and is entitled to probate (f) Where property is given to executors as trustees the fact of taking probate of the will is in itself an acceptance of the particular trusts. An executor is bound to do what he is expressly directed by the testator and cannot allege that he is not clothed with any of those powers (g) Where persons are appointed as executors and trustees a revocation of their appointment as executors is not necessarily a revocation of their appointment as trustees (h).

8 (d) Indian Christian The expression was not defined in the Act of 1865. The definition of Indian Christian is taken from the Native Christian Administration of Estates Act (VII of 1901) except that the words Indian Christian have been used instead of Native Christian following the modern practice in this respect. Notes on Clauses.

As to the law governing succession to the estate of a convert see S 4 note.

9 Change See Extract from Notes on Clauses above.

10 (e) Minor Minority Old Law. The terms were thus defined in the Act of 1865: minor means any person who shall not have completed the age of eighteen years and minority means the status of such person. But by S 3 of the Indian Majority Act (IX of 1875) as amended by the Guardians and Wards Act (VII of 1890) the age of majority of persons of British Indian domicile was fixed at 18 but where a guardian of the person or property or both (other than a guardian

(a) p. 131 12 Ed. where the learned author refers to 2 Blackstone Comment
Farrington v Knightly 1 P W 548 549
 (b) W 159 11 Ed
 (c) See S 222
 (d) See S 227 and note
 (e) *Baroda v Gajendra* 9 C L J 383 13 C W N 557

(f) *Re Monohur* 5 C 756 *Re Baylis* 1 P & D 21 fold
 (g) *Booth v Booth* 1 Beav 125 *Stiles v Guy* 4 Y & C 571 575 *Williams v Nixon* 2 Beav 472 W 1417 11 Ed
 (h) *Graham v Graham* 16 Beav 550 *Horley v Horley* 18 Beav 58 W 1417 n See s 36 note

for a suit under O. 32 of the Civil P. Code) has been appointed or the superintendence of the property of the minor has been assumed by the Court of Wards, then the minor shall be deemed to have attained majority on completing 21 years. The two definitions were thus at variance in as much as the former ignored the effect of the appointment of a guardian. Accordingly in the Probate and Administration Act (V of 1881) the definition here given was adopted.

11 Effect of appointment of a Guardian With regard to the appointment of a guardian, it has been held that in order to postpone the period of minority, the appointment must be made before the minor has attained the age of 18 (a) and the certificate granted before the completion of that age (b). The minority will be extended whether the guardian (c) or the superintendence of the Court of Wards (d) continues or not, even if the certificate be afterwards cancelled (e). A testator of whose person or property a guardian has been appointed is incapable of making a will before he has completed 21 years (f).

12. Computation of age S 4 of the Indian Majority Act lays down that in computing the age of any person the day on which he was born is to be included as a whole day, and he shall be deemed to have attained his majority on his 18th or 21st birthday, as the case may be (g).

13 Application of the rule A will of a Hindu shall be valid if he has attained majority under the Indian Majority Act. He cannot claim to have attained majority at 16 under Hindu Law (h). A European British subject attains majority at 18 (i). Where a person could not establish this character, nothing being known about his parents or whence he came, being resident of Calcutta, he was held to have attained majority at 18 (j).

14 Where the rule does not apply The definition of the word 'minority' given in this Act does not affect the capacity to make contracts (k), or give an authority to adopt (l), but relates solely to matters of administration of and of succession to property.

15 Any other person, etc. These words read with the preamble and S 3 of the Indian Majority Act have been construed to mean any other person not domiciled in British India and, therefore, must include persons whether they be aliens or strangers (m).

- (a) *Gordhandas v Harivolabh*, 21 B 281, 285, *Periya v Seshadri* 3 M 11.
 (b) *Stephen v. Stephen* 9 C 901, per contra *Shivram v Krishna Bai* 31 B 80, 8 Bom L R 897.
 (c) *Rudra v Bhola* 12 C 612.
 (d) *Gordhandas v Hanvalabh* 21 B 281.
 (e) *Khwahushali v Surju* 3 A, 598, but the rule was different before the amendment of the Majority Act by the Guardians and Wards Act. *Nagardas v Anand Rao* 31 B 590. *Brj Mohun v Rudra* 17 C 944 M 15.
 (f) *Kondapalli v Mandapaka* 48 M 614, 69 I C. 733 P C., *Re Miranda*,

- 28 C. W N 527, 81 I C. 1008.
 (g) *Lester v. Garland* 15 Ves 257, "the law does not recognise fractions of a day".
 (h) *Hardwar v Gomi* 33 A. 525, 8 A L J 385.
 (i) *Rollo v Smith* 1 B L R O C J 10.
 (j) *Archer v Watkins* 8 B L R O C J 372.
 (k) *Archer v Watkins*, 8 B L R O C J 372, *Sultan v Smyth*, 12 B L R 358, 21 W R 221.
 (l) *Kondapalli v Mandapaka*, 43 M 614, 42 C L J 38.
 (m) *Re Sewnain* 21 C. 911.

16 (f) Probate. Two things go to form probate as defined in the section, (1) a copy of the grant of administration to the estate of a testator, and (2) a copy of the will attached to it. One without the other is not sufficient (a). A probate must further bear the seal of the court which issued it. Probate is granted only to an executor appointed by the will (b).

17 Value of Probate. A probate unrevoked is conclusive as to the appointment of executors and of the validity and contents of a will. The will cannot then be impeached by evidence even of fraud (c).

18 (g) Province. The test of a province being the existence of "a Court of the last resort", it was decided that Assam was not a province but a district for the purpose of this Act (d). The term has, however, been defined in the General Clauses Act (e) to "mean the territories for the time being administered by any local Government". According to the latter definition Assam would now be a province. It was proposed to omit the definition, but as that would have the effect of altering the existing law the definition given in the Act of 1865 has been here reproduced.

19. (h) Will. A will is defined by Jarman (f) as 'an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his life'. A will, therefore, makes a disposition of property which comes into operation on the death and only on the death, of the testator (a). Until that event it has no effect whatever and until that event the testator is free to alter or revoke it at his will and pleasure (See S. 62). This is what is meant by the word "ambulatory". A will has been described as "a continuous act of gift". 'Such a disposition of property to take effect upon the death of the donor, though revocable in his lifetime, is until revocation, a continuous act of gift upto the moment of death and does then operate to give the property disposed of to the persons designated as beneficiaries' (h).

20 Origin of Wills. The idea of a will is of Roman origin. It was unknown in Hindu law till the establishment of British rule in this country (i). It was first established in England with reference to goods, indeed, strictly speaking, a testament means a will dealing only with personalty. Wills of goods and, later on, wills of freehold land, were both introduced in England by the influence of the Church and then developed under the influence of the Court of Chancery.

21. Characteristics of a Will. (a) A will must make a disposition of property. Thus, where a testator by his will said he proposed to bequeath his residue by codicil, "or otherwise to allow the same to go to his next of kin according to the statute of the distribution of the estate of intestates," and

(a) *Delaney v Rohamat*, 32 C. 710, 713

(b) S. 272

(c) *Griffith v Hamilton* 12 Ves 298, 307, *Hammaji v Dhanbaji* 12 B 164, *Cercha v Concha* 11 A C 541, *Bradford v Young* 29 Ch D 617

(d) *Thakoor Kista v Basoodet* 12 W R 424

(e) Act X of 1897 S. 3 (43)

(f) 7 Ed. p. 29. See also General Clauses Act S. 3 (57)

(g) *Re Morgan* 1 P & D 214, *Cock v Cooke* 1 P & D 241

(h) *Togore Case* 9 B. L. R. 377, 18 W. R. 359, 1 A. Sup. vol. 359

(i) See Mayne, Hindu Law, Ch. XI

he made no codicil, *held*, he had died intestate as to the residue (a) So, where the sole executrix to whom the testator had given all his property died in the life time of the testator, *held*, there was intestacy (b) A statement in a will that the testator has, at a former time, made a gift to a charity does not make it a testamentary gift (c) Ordinarily, the property that is disposed of must be the testator's own Thus, an instrument containing a disposition of idols property by a Mohunt (d), a provision for the appointment of succeeding shebais (e), is not a will. Property which passes by survivorship cannot be disposed of by will (f) On the other hand, a person can dispose of by will property which is not his own but over which he has a power of appointment (g).

(ii) A will is always revocable, even if the testator were to declare it to be irrevocable (h) The irrevocability of a document is inconsistent with its being a will (i) The insertion of a revocation clause in a will so far from indicating an intention to make a will gives quite a contrary colour to the transaction, as a will does not require any express power to render it revocable (j)

(iii) A will, it has been said, is ambulatory, i.e., the gifts do not take effect until after the death of the testator This is the special characteristic of a will (k) Where certain provisions in an instrument as to the management and ultimate beneficial interest showed that its operation might extend beyond the lifetime of the owner *held* it was a will (l) and was revocable (m) If a part of the dispositions is intended to take effect after death, then the instrument is, in part, a will (n) Where an intention is expressed that the testator intends to remain owner of the property during his life that does not prevent the instrument from being a will An instrument providing for contingencies not ascertained until the death of the executant, and not purporting to give anybody possessory or present interest until his death, is to be regarded as a will (o) Therefore, a document embodying the legal declaration of a testator's intention with respect to his property which he intends to be carried into effect after his death is a will (p). The principal test to be applied in order to determine whether a document is a will or not is whether the dispositions take effect during his life-time or after his death If it be of the latter class it is ambulatory and revocable during

- (a) *Ash v Ash* 33 Beav 187, *Poorendra v. Hemangini*, 36 C. 75, 12 C. W N 1002
 (b) *Re Ford* (1932) 2 Ch 605, J 7 Ed p 29
 (c) *Banubi v Narsingrao* 31 B, 250, 9 Bom L.R. 91
 (d) *Krishna v Kali* 11 C. 216, *Chaitanya v Dayal* 9 C. W N 102, *fold*
 (e) *Uma Charan v Rakhal Das*, 45 C. L. J 145, 105 I C 12
 (f) See s. 211
 (g) See Ss. 69 91
 (h) *Ignora's Case* 8 Co Rep 82 a, 77 E.R. 597, *fold in Sagar v Dwarika* 31 C. 380,
 (i) *Sifa v Deo Nath* 3 C. L. J 370, 8 C. W N 614, *Thakur Umrao v Thakur Lachman*, 13 C. L. J 519.

- Re Robinson*, 1 P & D 385, *Ram Moni v Ram Gopal*, 12 C. W N 942
 (j) *Reference &c.* 20 B 210 *Re Hays* 1914 P 192 197. See S 62 and note
 (k) *Cock v Cooke* 1 P & D 214, *Re Coles*, 2 P & D 352; *Ramchal v Lakshman*, 5 B 630, 635, *Re Hemys* 4 C. 721, *Lakshmi v Subramanya*, 12 M 493
 (l) *Reference &c.* 21 B 210
 (m) *Ram Moni v Ram Gopal* 12 C. W N 942
 (n) *Chand v Lakshmi* 22 A 162, *Re Komola Kant* 4 C. L. R 431
 (o) *Thakur Ishit v Thakur Baldeo* 10 C. 792
 (p) *D. Tarn v Aris*—s. 35 C. 147, 156.

PART II.

Of Domicile

4 This Part shall not apply if the deceased was a Hindu, Application of Part Muhammadan, Buddhist, Sikh or Jaina

1 Change S 331 of the Act of 1865 ran as follows —

33¹ The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist nor shall they apply to any will made, or any intestacy occurring, before the first day of January, 1866

The 4th section shall not apply to any marriage contracted before the same day

2 Hindus Mr Stokes (a) is of opinion that the word is used as a theological term denoting persons professing any form of the Brahminical faith or religion of the Paranas Therefore by embracing the Christian religion a person ceases to be a Hindu although he may be of Hindu descent and may have retained some Hindu customs Such a person will not be a Hindu within the meaning of this section (b) Similarly, Cutchi Memons are not Hindus within the meaning S 2 of the Hindu Wills Act (now S 57), although in one point connected with succession the Memons observe a Hindu usage (c) It has been laid down that to entitle a person to have the Hindu or Muhammadan law applied to him he must be an orthodox believer in the Hindu or Muhammadan religion and if he fail to establish his religion, he can not claim to be governed by its laws so he must be relegated to the class of persons whose cases are dealt with according to the principles of justice, equity and good conscience (d) But this narrow view has not been accepted On the other hand it has been observed that the Hindu religion is marvellously catholic and elastic and so eludes definition A Hindu does not cease to be a Hindu in the contemplation of law simply by reason of heterodox practices e.g., by taking prohibited food or dining with Christians or Muhammadans These do not amount to a renunciation of his religion It is not possible for a court in such a case to say that he has ceased to be a Hindu (e) The word Hindu as used in S 331 of the Act of 1865 embraced Sikhs Jains and Brahmos (f) Prostitutes who are Hindus in origin are Hindus within the meaning of this section (g) According to Mr Stokes the primitive non Aryan inhabitants of India are not Hindus in the sense in which the term is employed here New castes may arise which constitute a departure from the principles of the *Shastras* so great that the community which has adopted them must be taken to have lost the character of being governed by Hindu religion e.g. the Kalais of Burma (h)

- (a) p. 200 See *Ralan v Adm Genl* 55 M L J 478 1111 C 364
 (b) *Dagge v Pacott* 19 B 783
 (c) *Re Haji Ismail* 6 B 452 463
 (d) *Raj Bahadur v Bishen* 4 A 343
 (e) *Re Sndar Dayal Sing Jopendra v Rani Bhagwan* 19 O P W R 251 (law fully discussed) approved in *Bhagwan Koer v J C Bose* 30 I A 247, 31 C 11, 6 Bom L R 645.

- 7 C W N 895 31 M L J 331, see *Kusum v Salyaranjan* 7 C W N 784
 (f) See post under respective head agt
 (g) *Saramayee v S S for India* 25 C 254; 2 C W N 97 *Na ain v Tilak* 29 A 4 *Sutbaraya v Ramasami* 23 M 171
 (h) *Na Yait v Naung Chit* 48 I A 553; 49 C 310; 66 I C 607

3. Case of converts. In respect of a case of succession arising prior to the Act of 1865 it was laid down that the law to be applied to a person would be determined by ascertaining the law or custom of the class to which such a person attached himself after conversion and by which he preferred that his succession should be governed (a) In spite of conversion, therefore, a person could be governed by Hindu law (b) The general principle to be applied to cases of converts, as laid down in *Baij v. Bai Santok* (c), was that in respect of matters of inheritance and succession they might continue to be governed by their old law if a well established custom of such converts following that law could be proved But in *Kariakali v. Digbijai* (d) it has been laid down that no countenance can be given to the principle that when the deceased was a Christian still he could by his acts make such an indication as the law would respect to the effect that his succession was not to be governed by the Succession Act and the older cases were overruled The term Hindu, it has been observed, includes those who are Hindus in origin as also converts to Hinduism, and converts to Christianity can not come under that designation. It is not enough to show that the deceased was born a Hindu, but it must be shown that at the date when the question in suit arose he professed a form of Brahmanical religion or that of the Puranas (e) In an obiter in *Sohan Lal v. Meluin* (f), the view has been expressed that by virtue of a local Act, or, if there be any local law to that effect, an Indian Christian by proving a particular custom may still be governed in matters of succession, adoption, etc., by the local law and not by the provisions of this Act.

The question whether a convert from Hinduism can continue to remain joint with the Hindu coparceners with the benefit of survivorship has been decided affirmatively by the Bombay High Court (g), negatively by the Madras High Court (h) The Calcutta High Court has laid down that on conversion of a member of a joint Hindu family he ceases to be a member of a joint Hindu family but continues to hold the property as joint owner (i). The Allahabad ruling is to the effect that conversion affects all properties acquired subsequently to it. It has an immediate and prospective and not a retrospective effect (j) For the law as regards converts to Hinduism see *Ratansi v. Adm. General* (k)

4. Muhammadans (l). Hindu converts to Muhammadanism are to be governed by Muhammadan law. Query, whether such converts can retain for several generations Hindu usages and customs and set up a special customary law of inheritance (m) Succession to the estate of converts from Hindu to Muhammadan faith is governed by the Muhammadan law and Hindu relations are excluded from

- (a) *Lastings v. Gonsalves*, 23 B 539
 (b) *Abraham v. Abraham*, 1 W. R. P. C. 1; *Gajapathi v. Gajapathi*, 14 W. R. P. C. 33.
 (c) 20 B. 53.
 (d) 481 A 381; 43 A 525, 533; 64 I C 559
 (e) *Nepen v. Silli*, 12 C. L. J 459; 15 C W. N. 158, 8 I C 41, (lawfully death with).
 (f) 116 I C 308
 (g) *Francis v. Gabri*, 31 B 25,

- (h) *Tellis v. Seldanha*, 10 M 69.
 (i) *Kulada v. Hanpada*, 40 C. 407, 417-18, 17 I C 257 There is no forfeiture by reason of conversion under the Castes Disabilities Removal Act, 1850, *Ghanshamdoss v. Sarascott*, 87 I C 621, 630
 (j) *Raj Bahadur v. Bihari*, 4 A 343.
 (k) 55 M. L. J 478 111 I C. 364
 (l) See Mulla, Hindu Law 4-7, 6 Ed
 (m) *Jowala v. Dharum*, 10 M. L. A 511, 538.

succession to the estate of such converts (a). The Lahore High Court has taken a contrary view (b).

5. **Sikhs.** They have been regarded as a sect of the Hindus forming a dissenting branch and as such included in the term Hindus as used in the Act of 1865 and in the Probate and Administration Act (c). In the absence of a special custom Hindu law is applied to them (d). Mere indulgence in certain practices as to eating and living reprobated by other Hindus or Sikhs or professing to be a Brahmo does not make a Sikh cease to be Hindu or Sikh (e).

6. **Jainas.** The Hindu law is applicable to them in the absence of any custom varying that law (f).

7. **Buddhists.** The term does not apply to the Chinese Buddhists of Burma (g) (who are governed by the Succession Act if domiciled in Burma) nor to a sect forming a distinct caste like the Kalais of Burma (h).

8. **Brahmos.** It has been held that a Sikh following the Brahmo faith does not cease to be a Hindu or a Sikh (i) and also that a declaration under Act III of 1872 does not imply renunciation of Hindu religion (j). But the law has now been changed in respect of persons professing the Hindu, Buddhist, Sikh, or Jaina religion who marry under Act III of 1872 (k).

5. (1) (S. 5) Succession to the immoveable property in British India of a person deceased shall be regulated by the law of British India, wherever such person may have had his domicile at the time of his death.

Law regulating succession to deceased person's immoveable and moveable property, respectively.

(a) *Ch. J. L. v. N. v. N. v. N.*

753.

- (b) *Rupa v. Sardar Mirza*, 1 Lah. 376, *Ioling Bhagwant v. Kallu* 11 A. 100; see also *Bal Baiji v. Bal Santok*, 20 B. 53, but see *Francis v. Gabri* 31 B. 25. As to the law applicable to Khojas and Cutchi Memons, see *Mulla, Hindu Law* 585, 6 Ed.
- (c) *Bhagwan v. Bose*; 30 I. A. 249; 31 C. 11; 6 Bom. L. R. 845
- (d) *Kissen v. Baldam*, 2 Morley's Digest, 22; *Jugro Mohun v. Saumcoomar*, 2 ibid. 43; see *Lopes v. Lopes*, 5 Bom. H. C. O. C. 172, 185.
- (e) *Babu Jogendra v. Ral Bhagwan*, 1909 P. R. 241.
- (f) *Sheo Singh v. Dakha*, 51 A. 87; 1 A. 634; *Cholay Lal v. Chunnoo Lal*, 4 C. 744; 3 C. L. R. 465; *Kalgarda v. Somappa*, 33 B. 669; *Ambatal v. Goind*, 23 B. 257; *Bachal v. Nathan Lal*, 3 A. 55; *Mohabeer v. Kundun* 8 W. R. 116; see *Hameeth v. Rajafet*, 27 C. 379;

as to an account of their religious system, see *Manohar v. Banarsi*, 29 A. 495.

- (g) *Ma Thein v. Ah Shain*, 7 Bur. L. T. 246; 8 L. Bur. R. 22; 24 I. C. 367; *Ioling Fone v. Ma Gye*, 2 L. Bur. R. 95. *Phan Tiyok v. Lim Kyin*, 8 R. 57, 124 I. C. 849; See *Leong v. Leon*, 121 I. C. 796
- (h) *Afa Yait v. Maung Chit*, 48 I. A. 553; 49 C. 310; 66 I. C. 609.
- (i) *Babu Jogendra v. Rant Bhagwan*, 1900 P. R. 241; on app. 31 C. 11; 7 C. W. N. 895.
- (j) *Re Jnanendra*, 26 C. W. N. 799; see *Afa Yait v. Maung Chit*, 48 I. A. 553; 49 C. 310; 66 I. C. 609.
- (k) By Act III of 1872 (S. 24) as amended by the Special Marriage (Amendment) Act (S. 4) XXX of 1923 it is now enacted: "Succession to the property of any person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act."

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

Illustrations.

(i) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable in British India. The succession to the whole is regulated by the law of British India.

(ii) A, an Englishman, having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.

1. Change The words "shall be" have been substituted in place of the word 'is' and the words 'such person' in place of 'he' "

2. Domicil defined Domicil has been defined as the place in which a person's "habitation is fixed without any present intention of removing therefrom" (a), or, as 'the residence at a particular place accompanied by positive or presumptive proof of an intention to remain there for an unlimited time,' (b) or, as that place in which a person "has voluntarily fixed the habitation of himself and his family not for a mere special and temporary purpose, but with a present intention of making it his permanent home unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other home" (c); and again, as "an habitation fixed in some place with an intention of remaining there always" (d). In *Whickler v Hume* (e) it has been described as signifying a 'permanent home' and added that "if that was not understood by itself, no illustration could make it intelligible" (f). Prof Dicey's own definition of it is as "the place or country which is considered by English law to be his permanent home. This is (1) in general, the place or country which is in fact his permanent home, (2) in some cases, the place or country which, whether it be in fact his home or not, is determined to be so by a rule of English law." The idea of domicil, therefore, comprises, (i) the fact of residence in a particular place, and (ii) an intention of remaining there for an indefinite or unlimited time (*animus manendi*), and in case of acquisition of a new domicil, (iii) an intention to abandon the former domicil whether of origin or of choice (*animus relinquendi*) and it can be ascertained by means of a legal presumption or from the known facts of the case (g).

3 Its Importance Succession and distribution depend upon the law of domicil. Domicil is an idea of law. It is the relation which the law creates

(a) Story, Conflict of Laws, S 43
 (b) Phillimore
 (c) *Lord v Colton*, 28 L. J Ch 361, 366
 (d) *Droit de Gens*
 (e) 28 L. J Ch 395, 400, 7 H L C. 124
 (f) These and other definitions are given

in Dicey, Conflict of Laws 782, 3 Ed, see also Story, Conflict of Laws S 343 and Browne and Laty's Divorce 36 11 Ed
 (g) *Sita Devi v. Gopal*, 111 I C. 762, 776.

between an individual and a particular locality or country (a) Until the question of the domicile of a testator is determined, the Court of Probate can not tell what law of what country has to be applied (b) The law of domicile governs questions as to the validity of a will with regard to the testamentary capacity of the testator (c), as to the construction of the will (d), as to the bequeathable quality of the property bequeathed by the will (e), and the formalities with which the will should be executed (f) As has been observed in *Udny v Udny* (g) it is on the basis of civil status or domicile that the personal rights of a party, that is to say, the law which determines his majority or minority his marriage succession, testacy or intestacy, must depend All questions of testacy or intestacy, construction of the will determination of the heir or next of kin belong to the Judge of the domicile (h) Many foreign countries treat nationality and not domicile as determining the law of succession (i)

4 The application of the law of domicile It is a settled principle of English law that no one shall be without a domicile To every adult person the law ascribes a domicile (j) Where the law of the land said to be chosen as the new domicile disregards domicile there cannot be any change of domicile *de facto* and English Courts will distribute the property of a deceased person according to the law of the domicile of origin (k) Where the domicile of origin cannot be determined, the principles of natural justice, equity and good conscience will prevail (l)

For the purpose of succession the law of domicile governs the foreign personal assets For the purpose of legal representation of collection and of administration as distinguished from distribution among the successors the assets are governed not by the law of the owner's domicile but by the law of the locality (m) A will of personal estate made in exercise of a power of appointment conferred by an English instrument is not governed by the law of the domicile of the donee of the power (n) The operation of the law will be also excluded where there is sufficient evidence of intention on the part of the testator to exclude its operation (o)

- (a) *Bell v Kennedy* L. R. I Scotch Ap 307, 320 In this definition domicile has been viewed not as the foundation of jurisdiction but as furnishing the criterion of personal law See *Westlake Private International law* 335 3 Ed
- (b) *Re Martin* 1900 P 211 217
- (c) *Price v Demhurst* 4 My & Cr 76, *Re Osborne* 1 Jur N S 1220, *Re Hernandez* 27 Ch D 284
- (d) *Price v Demhurst* 4 My & Cr 76, 6 L. J Ch 226 *Reynolds v Kortright* 18 Bear 417 *Re Cunningham* (1924) 1 Ch 6^a
- (e) *Hickier v Hume* 28 L. J Ch 396 7 H L C 124
- (f) *Dolphin v Robins* 7 H L C 390 *Bremer v Freeman* 10 Moo P C C 366, see J 6 7 7 Ed
- (g) L. R. I Scotch Ap (457) See *Miller v Adm Genl* 1 C. (418)
- (h) *Enohin v Hylle* 10 H L C. 1

- (i) *Re Truport* 36 Ch D 600 (France), *Coller v Riva* 2 Curt 855 (Belgium) *Re Johnson* (1903) 1 Ch 821 (Baden) J 5 7 Ed
- (j) *Udny v Udny* L. R. I Scotch Ap (457) *Bell v Kennedy* L. R. I Scotch Ap 307 320
- (k) *Re Johnson* (1903) 1 Ch 821 *Bempde v Johnstone* 3 Ves 199 *Thorne v Watkins* 2 Ves Sen 35
- (l) *Skinner v Durga* 31 A 239 243 citing *Barlow v Orde* 5 B L R 1 13 M J A 277, 13 W R 41
- (m) *Blackwood v R B A C* (193) sold in *Henly v R* 1896 A C 567 *Enohin v Hylle* 10 H L C. (19) *Re Truport* 36 Ch D 600
- (n) *Dacey Conflict of Laws*, 740 see *Re Hernandez* 27 Ch D 284 *Re Fitzgerald* (1904) 1 Ch 573
- (o) *Bradford v Young* 29 Ch D 617, 26 Ch D 656 *Re Cunningham* (1924) 1 Ch 65 J 11 7 Ld

Treaties do not affect the operation of this law, *e. g.*, a British subject who makes his permanent home in Egypt will acquire a legal domicile in Egypt (a).

5. **How the law is applied.** It is to prevent the evils arising from the conflict of jurisdiction that the law of domicile was introduced and adopted by civilised countries (b). For the application of the law of domicile it is not necessary to resort to the tribunals of the country of the domicile of the individual concerned, but the Courts in this country will ascertain and apply it and make a grant to the person entitled by the law of domicile (c). The law may be ascertained by taking the opinion of an advocate versed in such law (d), or by remitting the case to another court in the British Empire (e). Where the principles of construction are common to both countries the court will decide on its own view of the case without such assistance (f). But where title has been adjudicated upon by the court of domicile such adjudication is regarded as binding upon the courts of England (g). Thus, where wills have been proved in the court of domicile, the English court will grant an ancillary probate or administration with the will annexed to the foreign representative to enable him to get possession of movable property in England (h). If a British subject makes his permanent home in a country where the law of domicile is not recognised, but succession is determined by nationality, and dies there, succession will be governed by the law of the domicile of origin (i). In determining a man's domicile no regard is to be paid to the place either of his birth or death or to the situation of the property at the time (j).

6 **Domicil Allegiance Residence.** It was at one time thought that domicile could not be changed without changing allegiance (k). But this doctrine has been declared to be wrong. 'To effect a change of domicile it is not necessary to obtain letters of naturalisation' (l). Residence in a country, it has been seen, is an essential part of the legal idea of domicile (m), but the two things are perfectly distinct, for domicile does not result from the mere fact of residence (n). But when there is residence coupled with the intention of remaining there, the fact of domicile is established (o). It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence and where his establishment is kept up (p). Domicile, therefore, is a

(a) *Casdagli v. Casdagli*, 1919 A. C. 145 overruling older cases like *Mallory v. Mallory* 7 Jur. 155, 8 Jur. 860.

(b) *Enghin v. Wylie*, 10 H. L. C. 1, see Wastlake, *Private International Law* Ch. I.

(c) *Re Trufort* 36 Ch. D. 600, *Meyappa v. Supramanian*, 1916 A. C. 603.

(d) *Harrison v. Harrison*, 8 Ch. 346, *Re Dost Ally* 6 P. D. 6.

(e) *Bradford v. Young* 26 Ch. D. 656 671, but see on app. 29 Ch. D. (622).

(f) *Bernal v. Bernal* 3 My. and Cr. 559, *Yates v. Thompson* 3 Cl. & F. 585, J. 97 Ed.

(g) *Re Trufort* 36 Ch. D. 600.

(h) *Enghin v. Wylie* 10 H. L. C. 1, *Re Price* (1900) 1 Ch. 442, *Re West*

yard, 1903 P. 125, see *Bhazoo v. Lakshmi Bai* 20 B. 607 (Probate Courts are not authorised by S. 271 to transfer a case to a foreign court see S. 22-1).

(i) *Re Johnson*, (1903) 1 Ch. 21.

(j) *Somerville v. Somerville*, 5 Ves. 750, 786, see S. 7 illust.

(k) *Moorhouse v. Lord*, 32 L. J. Ch. 295, 10 H. L. C. (283) *Story* 47 b.

(l) *Brunel v. Brunel*, 12 Eq. 295, *Douglas v. Douglas* 12 Eq. 613 4, *Winars v. A. I. Genl* 1904 A. C. 287, 299.

(m) *Re Toolal's Trusts*, 23 Ch. D. 532.

(n) *Winars v. A. I. Genl* 1904 A. C. (290) 1 the older decisions to the contrary may be taken to be overruled.

(o) *Uday v. Uday* L. R. 1 Scotch App. 441 452.

(p) *Price v. A. I. Genl* 3 A. C. (313).

conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time (a)

7. The Section. The rule laid down in the section may be thus summed up When a conflict of law arises on the death of an intestate, the devolution of his immovables is governed by the *lex situs*, the devolution of his movables by the *lex domicilii*. It is further conceded that whether a particular property is movable or immovable is decided according to the *lex situs* (law of the place where the property is situate) (b)

8 Succession to movables. Movables are always in contemplation of law supposed to be situate in the country where the owner has his or her domicile. It is not correct to say that the rule of law is that movables have no *situs*. They have a *situs*, but that *situs* is the domicile of their owner (c). It is not correct to say that the law of England gives way to the law of a foreign country, but that it is a part of the law of England that personal property should be distributed according to *jus domicilii* (d). Personal property is distributable, in case of a person domiciled abroad, amongst persons whom the foreign law has ascertained to be entitled to it, and it is not subject to the fiscal regulations of the country where it is found in the shape of legacy duty (e), etc. The validity of a will of movables made by a person domiciled in a foreign country at the time of his death depends on the law of his domicile (f).

9. Succession to immovables. Succession to immovable property must be regulated by the law of the country where the property is situate, *lex loci rei sitae* (g). But this rule does not apply to succession to immovable property held by Indian States (h). The validity of a will which purports to dispose of immovable property must be tested by rules applicable to the execution of wills in the country where the immovable property is situate (i). Mortgages of land are deemed to be immovable property (j), so also the proceeds of immovable property which is the subject of a settlement (k).

10. Domicil of a Corporation. The domicile of a trading corporation is determined by the situation of its principal place of business : *e*, where the administrative business is conducted and not where the manufacturing or other business operations are carried on (l). In case of other corporations, *e g*, colleges, hospitals, bishops, etc. the domicile is fixed by their connection with the locality where their

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| (a) <i>Udny v. Udny</i> , L. R. 1 Sc. Ap (455). | 576 589, 7 Cl & F. 895; <i>Bonnaud v. Emile</i> 32 C (640) |
| (b) <i>Re Berchold</i> , (1923) 1 Ch 192 See <i>Kershaji v. Kalkhushru</i> , 31 Bom L R 1081; 121 I C. 433 | (h) <i>Hajon v. Bur Sing</i> , 11 C 17 |
| (c) <i>Miller v. Adm. Genl.</i> , 1 C (416) | (i) <i>Bhaurao v. Lakshmi Bai</i> , 20 B (610). <i>Duncan v. Lawson</i> , 41 Ch D 394, <i>Re Percy</i> , (1895) 1 Ch 83 |
| (d) <i>Doe v. Vardill</i> , 5 B & C (451 2), <i>Re Martin</i> , 19 O P 211, 227. | (j) <i>Re Hoyle</i> , (1911) 1 Ch 179, on app from (1910) 2 Ch 333 |
| (e) <i>Chatfield v. Berchold</i> , 12 Eq 464 | (k) <i>Bonnaud v. Emile</i> , 32 C. 631, <i>Re Berchold</i> , (1923) 1 Ch 192 |
| (f) <i>Re Martin</i> , 1900 P (227 8), <i>Re Elliott</i> , 4 C. 105, see <i>Wills Act</i> 1861, 24 & 25 Vict C 114 | (l) <i>Adams v. G. H. Rail Co.</i> , 6 H & N 401, <i>Watkins v. Scottish &c</i> 23 Q B D 285 |
| (g) <i>Doe v. Vardill</i> , 2 Cl & F. 571, | |

functions are discharged. As to whether a corporation can have more than one domicile, the better opinion seems to be in the negative (a).

11. At the time of his death. Succession to the movable property of an individual with a foreign domicile is governed by the law of domicile as it existed at the time of his death. Changes made in that law after the date of his death do not affect the distribution of his personal property (b). Further, no will shall be held to be revoked or become invalid nor shall the construction be altered by reason of any subsequent change of domicile of the testator (c).

One domicile only affects succession to moveables.

6. (S. 6) A person can have only one domicile for the purpose of the succession to his moveable property.

The Section. It has been stated before that to every adult person the law ascribes a domicile (d), therefore no man is without a domicile (e). The question is, can he have more than one? It was laid down in the older cases that a man might have different domiciles for different purposes, *e.g.*, one for succession and one for marriage (f), though for the purpose of succession there could be but one domicile (g). But it is now held that it is not possible for a person, including a corporation, to have more than one domicile (h).

7. (S. 7) The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Illustration.

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.

8. (S. 8) The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

1. The rule. "It is a settled principle that no man shall be without a domicile and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile

- (a) *Saccharn Corp v Chemische & Co.* (1911) 2 K B 516, 526, 527. See Dicey, Conflict of Laws 163-166; *Tufika v. Parry & Co.*, 27 M 315 and cases referred to therein.
- (b) *Lynch v Provisional Government & Co.* 2 P. & D 268; *Re Johnson*, (1903) 1 Ch 821.
- (c) *Re Rippon*, 32 L. J. P. 141; *Re Groos* (1904) P. 269; now provided by St 24 & 25 Vict. c. 114 S. 3
- (d) *Bell v. Kennedy*, L. R. 1 H. L. Scotch Ap 307, 320.

- (e) *Udny v. Udny*, L. R. 1 H. L. Scotch Ap 441, 457.
- (f) *Somerville v Somerville*, 5 Ves. 750 *Re Capdevielle*, 33 L. J. Ex 306, 316; see Domicil Act, 24 & 25 Vict c 114
- (g) *Somerville v Somerville*, 5 Ves 750, 786
- (h) *Saccharine Corp v Chemische Fabrik*, (1911) 2 K. B 516, 527; *Udny v Udny* L. R. 1 Scotch Ap. 441, 448; Dicey 99 sq see S. 5, note (10).

of his mother, if illegitimate. This has been called the domicile of origin and is involuntary" (a)

2. **The domicile of origin.** It is that arising from a man's birth and connections and is not necessarily the place of his birth (b) Every person on his birth has a domicile or legal home, which is the domicile of his father (if he be of legitimate birth) or of his mother (if illegitimate), which determines some of his legal rights (c).

3. **Posthumous child Foundling** The domicile of a posthumous child is that of his mother under English law which therefore differs from that of this country. The domicile of a foundling whose parents are unknown is determined by the place of his birth (d).

Continuance of domicile of origin 9. (S. 9) The domicile of origin prevails until a new domicile has been acquired.

The rule The domicile of origin continues until the person in question has acquired another by manifesting and carrying into execution an intention of abandoning his former domicile and taking another as his sole domicile (e), i.e., until he "has made a new home for himself in lieu of the home of his birth"; therefore a domicile of origin cannot be simply abandoned by leaving a particular country where a person had his domicile without adopting some other domicile (f). The domicile of origin clings and adheres to person until he chooses to divest himself of it by substituting a domicile of choice for the domicile of origin (g) It follows that the question in case of a change of domicile of origin is not whether there is evidence of an intention to retain the domicile of origin but whether it is proved that there was an intention to acquire another domicile" (h)

Acquisition of new domicile 10. (S. 10) A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation—A man is not to be deemed to have taken up his fixed habitation in British India merely by reason of his residing there in His Majesty's civil or military or air-force service, or in the exercise of any profession or calling.

- (a) *Udny v Undy* L. R. 1 H. L. Scotch Ap. (1857), see *Munro v Munro* 7 Cl. & F. 842, *Vaucher v Solicitor to the Treasury*, 40 Ch. D. 216, Story S. 46
- (b) *Somerville v Somerville* 5 Ves. (787), *Santos v Pinto*, 41 B. (697), *Bannard v Emile* 32 C. 631
- (c) *Udny v Undy*, L. R. 1 H. L. Scotch Ap. 441, *Dalhousie v Macdonnell*, 7 Cl. & F. 817, *Urquhart v Butlerfield*, 37 Ch. D. 357; *Re Johnson*,

- (1903) 1 Ch. 821, see S. 14 note
- (d) *Bempde v Johnstone*, 3 Ves. 193
- (e) *Somerville v Somerville*, 5 Ves. (787)
- (f) *Aikman v Aikman*, 5 Macq. 854, 863, 877; *Re Johnson*, (1903) 1 Ch. 821.
- (g) *Santos v Pinto*, 41 B. 687, 697, 18 Bom. L. R. 715, 361 C. 227
- (h) *Winn v All Genl* 1904 A. C. 287, see *Re Martin*, 1900 P. 211; *Huntly v Gaskell*, 1906 A. C. 56

Illustrations.

(i) A, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(ii) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(iii) A, whose domicile of origin is in France, comes to reside in British India under an engagement with the Government of India for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(iv) A, whose domicile is in England goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(v) A, having gone to reside in British India in the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. A has acquired a domicile in British India.

(vi) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(vii) A, having come to Calcutta in the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in British India.

1. **Change.** The words "deemed to have" have been substituted for the words "considered as having" and the word "His" for the word "Her" before "Majesty's" in the Explanation. The words of air-force have been added by Act X of 1927.

2. **The section.** The rule as laid down in the section is not happily worded. The term 'fixed abode', or 'fixed habitation', to use the language of the section, is not equivalent to domicile, the intention to reside must also appear (a). See Illustrations.

3. **The rule.** The English cases conclusively establish that "if the intention of permanently residing in a place exists, a residence in pursuance of that intention will establish a new domicile" (b). A change of domicile "can only be effected *animo et facto*, that is to say, by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdiction of the new

(a) *Re Tootel's Trusts*, 23 Ch. D 532, 541, see *Re Grove*, 40 Ch. D 216, 222, sq.

(b) *Bell v Kennedy*, L. R. 1 H. L. Scotch App. 307, 319.

domicil extends (a) So it is necessary to show that there was both the *factum* and the *animus*, the fact and the intention (b) For the acquisition of a new domicil, therefore, two things are necessary, (1) a fixed intention of establishing a permanent residence in some other country, and (2) the carrying out of this intention by actual residence there (c) It imports something more than a mere change of residence The intention to abandon the old domicil must be proved by satisfactory evidence (d) The Legislature has said nothing about 'intention' (e) but has apparently left it to be understood by the use of the word "fixed" That this is unsatisfactory will be further borne out by the decision in *Re Patience* (f), where a person was held to have his domicil in a country which he did not visit for 72 years and not in the country where he spent the last 22 years of his life Permanent residence, however, furnishes cogent evidence of an intention to acquire a new domicil (g)

4. Intention as a factor in domicil (h) (i) The intention to acquire a new domicil must amount to a choice or purpose The domicil of origin, it has been said, is "involuntary" (i) but the domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place (j) It must not be dictated or prescribed by external necessity (k) The choice must be a voluntary one (l) A contingent intention of leaving a country does not defeat the intention which is necessary to accompany the *factum* in order to establish a domicil of choice (m)

(ii) The intention must be to reside permanently or for an indefinite period (n) A residence originally temporary may become general and "as soon as the change of purpose or *animus manendi* can be inferred the fact of domicil is established" (o)

(iii) There must be the intention to leave the place, where the party has acquired a domicil and to go to reside in some other place as the new place of domicil or the place of new domicil (p) Thus residence for the sake of health will not enable a man to acquire a new domicil (q)

(a) *Udny v Udny*, L R 1 H L Scotch App (459)

(b) *Cockrell v Cockrell* 25 L J Ch 730, *Brunel v Brunel* 12 Eq 293, 100 H v

(c) L App (112)

(d) *Huntly v Gaskell* 1906 A C. 56, see S 9 note

(e) The factor however has not escaped the attention of the framers of the Act see illustrations (i) and (cii)

(f) 29 Ch D 976

(g) *Re Marlin* 1900 P. 211 238, see the excellent treatment of the subject in Prof Dicey's *Conflict of Laws* p. 109 sq from which this brief summary has been made see also *Jopp v Wood* 34 L J Ch 212, 4 D G J and S 616

(h) Summarised from Prof Dicey's book *Udny v Udny* L R. 1 H L Scotch

App (457), *Santos v Pinto*, 18 Bom L R 715, 36 I C 227

(j) *Udny v Udny* L R 1 H L Scotch App (458)

(k) See the above case

(l) *King v Foxwell* 3 Ch 518 *De Bonneval v De Bonneval* 1 Curt 856 863, 864

(m) *All Gent v Pottinger* 30 L J Ex 284, per contra *Douglas v Douglas* 12 Eq 617, 645

(n) *Udny v Udny* L R 1 Scotch App (458) *Santos v Pinto* 41 B 697, 36 I C 227 (law fully discussed)

(o) *Jopp v Wood* 34 L J Ch 212 4 D G J & S 616 see *Sita Devi v Gopal* 111 I C. 762 775-6 but see *Doucet v Geoghegan* 9 Ch D 441

(p) *Lyall v Paton* 25 L J Ch 746: see *W'insan v All Gent* 1904 A C. 287 and S 9 note

(q) *Johnstone v Beattie* 10 Cl & F 42: see illustra (iv) and (vi)

(1r) To acquire a new domicile a change of allegiance is not necessary (a)

5 Effect of change Domicile of choice once validly acquired will override a man's intention (b)

6 Domicile of origin when continues When the law of the land where a person takes his 'fixed habitation' refuses to treat it as of any force, there can not have been any change of domicile *de facto* therefore the domicile of origin remains unaffected (c) English colonists take with them English law as it was at the time of their departure from England unless the intention to acquire a new domicile is established and the onus of establishing a change of domicile rests on the person who asserts it The domicile of origin continues till the domicile of choice is conclusively established (d) A domicile of choice is not affected by non-compliance with any rule of foreign law (cf S 11) for the proper acquisition of the new domicile (e) It was formerly held that British subjects residing under extra territorial jurisdiction, e.g., in China retained the English domicile (f), but this view no longer prevails (g)

7 Anglo-Indian Domicile It was decided long ago that a servant of the East India Company acquired an Anglo Indian domicile (h), but not a servant under the Crown (i) Anglo Indian domicile was not acquired by accepting a high office late in life (j) No change of domicile takes place simply by accepting service under the Crown (k) unless the servant shows the necessary intention (l)

11 (S 11) Any person may acquire a domicile in British India by making and depositing in some office in British India, appointed in this behalf by the Local Government, a declaration in writing under his hand of his desire to acquire such domicile, provided that he has been resident in British India for one year immediately preceding the time of his making such declaration

Change The words appointed in this behalf have been substituted for the words to be fixed and the word has for the words shall have

Some office in British India In Oudh, the declaration is to be deposited in the office of the Judicial Commissioner (m), and in Burma in the office of the Chief Commissioner at Rangoon (n)

- (a) See *Brunel v Brunel* 12 Eq 293
Douglas v Douglas 12 Eq (643 4),
Winans v All Genl 1904 A C 297, see S 5 note (6)
 (b) *Re Steer* 28 L J Ex 22, 3 H & N 594 see S 13
 (c) *Re Johnson* (1903) 1 Ch (828) See S 5 notes (3 and (5))
 (d) *Lauderdale Peerage Case* 10 A C 692 *Winans v All Genl* 1904 A C 297
 (e) *Hamilton v Dallas* 1 Ch D 257, *Bremer v Freeman* 10 Moo P C C. 306 373 4
 (f) *Abdul Messih v Farra* 13 A C. 431, *Re Tootal's Trusts* 23 Ch D 532
 (g) *Casdagli v Casdagli* 1919 A C 145

- (h) *Bruce v Bruce* 6 Bro P C. 566, *Jopp v Wood* 34 L J Ch 212, 4 D G J & S 616
 (i) *All Genl v Napier* 6 Exch 217 see *Hodgson v Beauchesne*, 12 Moo P C 285, *Allardice v Onslow* 33 L J Ch 434
 (j) *All Genl v Rome* 1 H & C. 31 31 L J Ex 314
 (k) *Re Macreight* 30 Ch D 165 *Moorhouse v Lord* 10 H L C 272
 (l) *Urquhart v Butterfield* 37 Ch D 357 377
 (m) *Gazette of India* July 15 1865 p 803
 (n) *Gazette of India* July 29 1865, p 845

12. (S. 12). A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor

Domicile not acquired by residence as representative of foreign Government, or as part of his family.

does any other person acquire such domicile by reason only of residing with such first-mentioned person as part of his family, or as a servant.

Change. The words "such first mentioned person" have been substituted for the word "him."

The rule. An ambassador (a) or an attache (b) does not acquire a new domicile simply by the fact of taking up his residence, however long it may continue to be, in a foreign country, the reason being that the intention to change is absent. There is, however, nothing to prevent a foreigner from acquiring the domicile of the country, where he resides as ambassador of the country of his domicile of origin, and from retaining the new domicile (c). The law is the same in the case of a consul (d). Mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country (e).

13. (S. 13). A new domicile continues until the former domicile has been resumed or another has been acquired.

Continuance of new domicile

The rule. A new domicile once acquired is not given up until residence in the country of that domicile is given up (f) with the intention of ceasing to reside there (g). It is only after giving up a domicile of choice in this fashion that another fresh domicile may be acquired or the domicile of origin resumed. Of course for that purpose residence in the country of the fresh domicile or in that of domicile of origin is necessary with the intention of residing there. Before a fresh domicile is acquired, but the moment the domicile of choice has been given up, the domicile of origin reverts. The domicile of origin remains in abeyance, in reserve as it were, to be restored in case no other domicile is found to exist. It is re-acquired even while a person is on his way, *in itinere* (h).

14 (S. 14) The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin

Minor's domicile

- (a) *Heath v Samson* 14 Beav 441
- (b) *Att Genl v Kent*, 31 L J Ex 391, 397.
- (c) *Heath v Samson* 14 Beav 441.
- (d) *Udny v Udny*, L.R. 1 H L Scotch App 441.
- (e) *Sharpe v Crispin*, 1 P & D 616
- (f) *Adoyet v Adoyet* 4 P D 1.
- (g) *Douglas v Douglas* 12 Eq 617.

- (h) *Att-Genl v Kent*, 31 L J Ex 391, 397
- (i) *Re Raffell*, 32 L J P & M 203
- (j) *Re Steer*, 28 L J Ex 22, *Re Marrett*, 36 Ch D 400 407
- (k) *Udny v Udny* L.R. 1 H L Scotch App 441 434 437, *Bill v Kennedy* ibid, 307, 310 321

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of His Majesty, or has set up, with the consent of the parent, in any distinct business.

The rule. No domicil can be acquired till a person is *sui juris*. During the state of pupillage a person cannot acquire any domicil of his own (a) Prof. Dicey (b) accordingly observes that an infant retains the last domicil which he had, or rather his parent gave, on attaining majority until he changes it. It has been laid down in S. 7 that the domicil of origin of a person of legitimate birth is in the country in which at the time of his birth his father was domiciled (c) This section states that the domicil of a legitimate child changes with the change in the domicil of his or her father. Thus A, the legitimate son of an Englishman, is born in England When 10 years old his father emigrates to and settles in America A is left at school in England A acquires an American domicil (d) B is legitimated under Scotch law by the marriage of his parents subsequent to his birth While he is yet a minor, his father acquires an English domicil. B becomes English (e) S 8 declares that the domicil of origin of an illegitimate child is in the country in which his mother was domiciled at the time of his birth. The domicil of such a child is now declared to change with that of his mother (f).

From whom. origin. These words have the effect of negating the application in this country of the rule of English law, now definitely settled, that after the father's death, if a child of legitimate birth lives with his or her mother, and the mother acquires a new domicil, it is communicated to the infant (g)

Exception. In *Rex v. Inhabitants of Wilmington* (h) the rule is thus stated "During the minority of a child there can be no emancipation, unless he marries, and so becomes the head of a family, or contracts some other relation, so as wholly and permanently to exclude paternal control" In *Rex v. Inhabitants of Rotherfield Greys* (i), it is laid down that an infant by enlisting in the marines and remaining in the service of the Crown until the attainment of majority is emancipated, but if before 21 his services cease and he returns to his family, he acquires the domicil which his parents gave him An infant, if engaged in business, may acquire a domicil for himself (j) The Act is silent as to the competency of a guardian to change his ward's domicil, which seems to be doubtful in English law (k).

(a) *Somerville v. Somerville*, 5 Ves (787),
Urquhart v. Butterfield, 37 Ch D
357, 378, see S 17.

(b) *Conflict of Laws* 3 Ed p 138.

(c) *Somerville v. Somerville*, 5 Ves 750,
5 R R 155, *Sharpe v. Crispin*, 1 P
& D 611; *Forbes v. Forbes* 23 L J
Ch 724, Kay 341; *Re Macreight*,
30 Ch D 165, *Re Beaumont*, (1893)
3 Ch 493, *Goulden v. Goulden*,
1893 D 210, 12 " 127

(d) " " " "

347, 360 *re*fd to

(e) *Udny v. Udny*, L. R. 1 H L Scotch
Ap. 441

(f) *Pottinger v. Wightman*, 3 Met 67,
17 R. R 20; *Re Beaumont*, (1893)
3 Ch 493, Dicey, 127

(g) *Johnstone v. Beattie*, 10 Cl & F. 42,
138, *Re Beaumont*, (1893) 3 Ch.
493

(h) 5 Barn. and A. 525

(i) 1 Bar and C. 345.

(j) *Stephens v. M. Farland* 8 L. R. 444

(k) *Douglas v. Douglas*, 12 Eq (625).

Domicile acquired
by woman on marriage

15. (S 15). By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

Wife's domicile during marriage

16. (S. 16). A wife's domicile during her marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

Change. The word "her" has been substituted for the word "the" in S. 16 and the word "are" for the word "be" in the Exception,

2. A wife's domicil. By marriage the domicil of the wife becomes that of the husband, whatever may be her age, if they had not the same domicil before marriage, and this domicil continues during coverture and changes with a change in the domicil of her husband (a). A woman, on marriage, acquires the domicil of her husband, not only by construction of law, but absolutely as a matter of fact, if she lives with him in the country of his domicil with the intention of taking up her permanent abode with him; the fact that the marriage is voidable at the option of one of the parties is immaterial (b). The domicil of a widow, therefore, is the last domicil of her husband, unless she has changed it after his death (c).

3. No separate domicil acquired by the wife. 'The fact that a wife actually lives apart from her husband (d), that they have separated by agreement (e), that the husband has been guilty of misconduct, such as would furnish a defence to a suit by him for restitution of conjugal rights (f), does not enable the wife to acquire a separate domicil' (g)

4. Divergence of nationality between husband and wife. The ordinary rule is that a wife who marries a foreign husband no longer retains any other domicil than his which she acquires and becomes subject to her husband's law (h). But they are permitted in certain cases to retain their divergent nationalities by St. 4 & 5 Geo V. c. 17; and this renders it difficult to maintain the strict

(a) *Dalhousie v Macdonald* 7 Cl & F. 817; *Warrander v Warrander* 2 Cl & F. (523); *Dolphin v Robins* 7 H L C 390, *Re Mackenzie*, (1911) 1 Ch 578, 593

(b) *Turner v Thompson*, 13 P. D. 37.

(c) *Kashiba v Shnpat*, 19 B 697 As to the effect of a change of domicil on the estate of a widow, see *Ma lathi v Suktarava* 24 M 650

(d) *Warrander v Warrander*, 2 Cl & F 498.

(e) *Dolphin v Robins*, 7 H L C 390, fold in *Re Mackenzie*, (1911) 1 Ch 578

(f) *Yelverton v Yelverton*, 1 Sw and Tr 574, *Dolphin v Robins*, 7 H L C. 390, 29 L J P. & M 11

(g) *Dacey*, Conflict of Laws, 3 Ed p 135. See however *Browne & Lacey Divorce* 47 11 Ed, for a contrary view, under heading "Deserted wife"

(h) *Harvey v Farnie* 8 A C 43

rule of domicile (a) An Englishwoman marrying a Hindu or a Muhammadan does not become subject to his special personal law unless she adopts his religion but retains her personal law of origin (b) An Englishwoman married to a foreign husband and deserted by him regains her English domicile (c)

5 Exception—The wife is free to acquire a domicile of her choice after a decree for divorce (d) Whether a decree for judicial separation would give the wife the power to acquire a domicile for herself is an open question in English law (e)

17 (S 17) Save as hereinafter otherwise provided in this Part, a person cannot, during minority, acquire a new domicile

Minor's acquisition of new domicile

Change The first eight words of the section have been substituted for the words Except in the cases above provided for

The rule This rule prevents a minor acquiring a new domicile by any act of his though domicile may be changed involuntarily (f)

18 (S 18) An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person

Lunatic's acquisition of new domicile

The rule Prof Westlake (g) is of opinion that a person who becomes insane after attaining his majority retains the domicile which he had at the commencement of his lunacy and he cannot thereafter acquire a new domicile and his domicile cannot be changed by another (h) There is another view however which has been adopted by the Legislature viz that a lunatic is like a minor therefore a person having the custody of a lunatic i.e. his Committee can change his domicile (i) The Committee in that case will have to remove with the lunatic to a different country with the intention of making a permanent home in that country Merely removing the lunatic will not do nor is residence for the purpose of health sufficient to acquire a new domicile (j) Prof Dicey is of opinion that the first view is the right one and the second arises from a confusion between the power to change a lunatic's residence and the right to change his domicile (k)

- (a) See *Dolphin v Robins* 7 H L C 390, 29 L J P & M 11 Lord Advocate v Jaffrey (1921) 1 A C 146 155 See S 21
- (b) *Ex p Mr Anwaruddin* (1917) 1 K B 634
- (c) *Stathatos v Stathatos* 1913 P 46
- (d) *Williams v Dormer* 2 Rob 505
- (e) Affirmed in *Dolphin v Robins* 7 H L C 390 420 *Le Sueur v Le Sueur* 1 P D 139 2 P D 79 *Re Mackenzie* (1911) 1 Ch 578 disapproved in *Lord Advocate v Jaffrey* 1921 A C 146 151 3 165 71 left open in 155 156 163 *Armstrong v Armstrong* 1893 P 178 196, *Anghinelli v Anghinelli* 1918

- P 247 254 256 but see *Re Grimthorpe's Settlement* 1918 W N 1916 Dicey 135 3 Ed
- (f) See S 14 and note *Somerville v Somerville* 5 Ves 749 787 where a man nor is a married woman see S 16 *Warrender v Warrender* 2 Cl & F 488 Dicey 136
- (g) Private International Law 346 7 Ed
- (h) *Bempde v Johnstone* 3 Ves 19^a *Urquhart v Butterfield* 37 Ch D 357
- (i) See *Sharpe v Crispin* 1 P & D 611 61^a
- (j) *Johnstone v Beattie* 10 Cl & F 42 *Firbrace v Firbrace* 4 P D 63
- (k) Conflict of Laws 152 3 3 Ed

19 (S. 19). If a person dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

Succession to moveable property in British India in absence of proof of domicile elsewhere

Change. The word "person" has been substituted for the word man

The rule. Sec 5. lays down the general law as to movables, this section provides for an exceptional case, *viz*, where the Court is unable, for lack of proof, to conclude that the deceased had his domicile elsewhere, then the *lex situs* or the law of British India is to be applied in case of succession to movables. Where the claim is not in the nature of succession, the law as to movables is not governed by the maxim, *Mobilia sequuntur personam* but by the *lex situs* or the law of the place where the movables are situate (a)

Onus of proof of domicile Where the domicile of a person *sui juris* is in dispute, the onus lies on the person asserting the change of domicile to establish it by satisfactory evidence (b) The presumption is against any change of domicile (c) Where the domicile of a person cannot be determined there is a presumption, in English law, of his domicile in favour of the place where he actually is, so that a place of birth or a place of death may under such circumstances determine his domicile (d) Where there is conflicting evidence as to domicile no such presumption arises (e)

(a) *Re Barnett's Trusts* (1902) 1 Ch 847
 (b) *W. Innes v. Att. Genl.*, 1904 A C 287.
W. Ficker v. Hume, 711 L C 124.
Bonnaud v. Lmille, 32 C 631
 (c) *Hodgson v. De Beauchêne*, 12 Moo P. C. 285, *Munro v. Munro* 7 Cl.

& F 842, 891
 (d) *Bruce v. Bruce* 2 B & P. 229 231.
Bempde v. Johnstone 3 Ves 195 301
 (e) *Somerille v. Somerille* 5 Ves 749 788. See *Johnstone v. Beattie* 10 Cl & F. 42.

PART III.

Marriage

20. (S. 4). (1) No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried

Interests and powers not acquired nor lost by marriage

(2) This section —

(a) (S 331). shall not apply to any marriage contracted before the first day of January, 1866,

(b) (Mar Women's Prop. Act 2). shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion

1 Change The words This section are new As to cl (a) compare S 331 cited under S 4 As regards cl (b) see note cl (b) A new Part has been formed of these three sections dealing with the rights arising upon marriage and not with rights of succession (see S 21 note)

2 The section It is not easy to ascertain the law prior to the Act of 1865 It was probably the law of England except so far as personal law could be claimed by the members of any particular class or some person might say that there was no law of India—no *lex loci* at all (a) It declares the *lex loci* of India as to the interest acquired upon marriage by the parties thereto in the property of each other (b) This section and the next lay down a general rule as to the immediate effect of marriage in respect of property belonging to each other not comprised in an antenuptial settlement They do not lay down a rule intended to affect a law of succession But it is impossible in dealing with rights which arise upon death to ignore the consideration of the rights which arise upon marriage accordingly these latter rights are dealt with in these sections (c)

3 The effect of the rule The rule laid down in the section has the effect of making a woman who comes within the Act and was married after the Act came into force enjoy her properties for her separate use without a specific contract for the purpose This section does not prevent property being settled upon her with a restraint against anticipation but such restraint is created not by marriage but by settlement This section declares that marriage will not any longer involve any proprietary disability (d) The meaning and effect of the rule

- (a) *Sparkies v Prossomnoyee* 6 C 794
804
(b) *Proby v Proby* 5 C 357 362 5 C.
L. R. I *Miller v Adm Genl* 1 C
412
(c) *Hill v Adm Genl*, 23 C. 506 512
Miller v Adm Genl 1 C 412

- reld to
(d) *Peters v Manuk* 13 B L. R. 383,
22 W R 175 compare the effect of
the Married Women's Property Acts
of England 45 & 46 V. c. 76 and
56 & 57 Vict. c. 63 See S 59
n. 9

will appear clear from the following words in the Preamble of the Married Women's Property Act (III of 1874) — And whereas by the Succession Act 1865 sec 4 (now s 20) it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her property, which he or she could not have done if unmarried And whereas by the force of the said Act all women to whose marriages it applies are absolute owners of all property vested in or acquired by them, and their husbands do not by their marriage acquire any interest in such property S 8 of the Act (III of 1874) makes the separate property of the wife liable for her antenuptial debts and s 9 releases the husband from liability for such debts

4 Cl (a) This clause has been inserted in order to leave rights unaffected which had already been acquired before the Act was passed The section therefore has no retrospective effect (a)

5 Cl (b) This clause formed S 2 of the Married Women's Property Act (III of 1874) which ran as follows — The fourth section of the Indian Succession Act shall not apply and shall be deemed never to have applied to any marriage one or both of the parties to which professed at the time of the marriage the Hindu Muhammadan Buddhist Sikh or Jaina religion That section is repealed and now forms cl (b) of this section

6 Wife's right to costs Before the Married Women's Property Acts in England the law gave the husband upon marriage an absolute right to the whole of his wife's personal estate and to the income of her real estate so that she was left absolutely destitute to conduct her suit for judicial separation or divorce Therefore Divorce Courts in England required the husband to provide for his wife's costs But that state of the law has been completely altered by this section in respect of persons subject to the Indian Succession Act and therefore the English practice ought no longer as a general rule to be followed (b)

21. (S. 44). If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage

The rule The ordinary rule is that the domicile of the husband or at least that of the marriage governs the rights of the parties where the domicils of the husband and of the wife are different (c) The Act however submits all their rights both as to movables and immovables to the territorial law of India To that extent the *jus gentium* or common law of nations has been set aside or

(a) *Sparkes v Posonmoyee* 6 C. 794
806, 8 C. L. R. 76

(b) *Probu v Probu* 5 C. 357; *Beatrice v Phil* p. 24 C. L. J. 226 233 etc

(c) *Ellen v William* 7 C. W. N. 565;
Broadhead v Broadhead 5 H. L. R.
Appds 9 *Natal v Natal* 9 M. 12
S. 15

modified This section and the previous one deal with different subjects. The former declares the general *lex loci* of India with regard to the rights of parties on marriage where both parties have an Indian domicile. This section lays down a special rule to govern a particular case, *e.g.* where one of the parties has an Indian domicile. It is not a modification of the *lex loci* but a declaration of the law in a particular case (a). These sections are not applicable to rights of succession because such rights do not arise upon the marriage but upon the death of the person. Next, such a contention would bring these two sections into direct conflict with Ss 5, 15, 21 and 33. The sections, therefore, refer to rights *inter vivos* and not to those arising upon death. A man with an English domicile marrying in this country a woman with an Indian domicile will be entitled to the whole of the fund left by the wife on her death to the exclusion of the next of kin, the succession not being governed by this Act (b).

22. (S. 45). (1) The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from British India, with the approbation of the High Court.

(2) (S. 331). Nothing in this section or in section 21 shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Change. The word 'is' is substituted for the word 'be' in cl (1). As to the second clause compare S. 331 of the Act of 1865 cited under S 4 *ante*.

The section. The section is based on the Infant's Settlement Act, 1855 (18 & 19 Vict. c. 43) which was passed to remove the inconvenience and disadvantage arising in consequence of persons marrying during minority being incapable of making binding settlements of property. An infant under that Statute can, in contemplation of marriage with the consent of the Court of Chancery, make a valid settlement of all or any part of his or her property over which he or she has a power of appointment, whether real or personal, whether in possession, reversion, remainder or expectancy. The sanction of the Court of Chancery may be obtained upon an application in a summary way without filing a suit.

PART IV.

Of Consanguinity.

23. (S. 331 P. I. S. A. 8). Nothing in this Part shall
 Application of apply to any will made or intestacy occurring
 Part before the first day of January, 1866, or to
 intestate or testamentary succession to the property of any
 Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.

Change. Compare S, 331 set out under S 4

The section. It is based on S 331 of the Act of 1865 Compare also S 8
 of the Parsi Intestate Succession Act (XXI of 1865)

First day of January 1866 It was on that day that the Act of 1865 came
 into force The present Act came into operation on the first day of January 1926
 The exclusion of wills or cases of intestacies occurring before the first of January
 1866 shows that like the old Act, this Act has no retrospective effect

Any Hindu, etc The exclusion of the classes mentioned from the operation
 of this Part is due to the reluctance of the Legislature at the time of the passing
 of the Act of 1865 to interfere with the laws of succession of those classes They
 were left to be governed by their respective personal laws Since then the Probate
 and Administration Act and the Hindu Wills Act have been passed dealing with
 the law of testamentary succession, which are now incorporated in this Act So
 far as intestate succession is concerned these classes are still governed by their
 own laws (See S 29) Intestate succession of Parsis were governed by the Parsi
 Intestate Succession Act (XXI of 1865) now forming Ss 50 56 of this Act With
 these classes excluded, the provisions of this Part are confined in their application
 solely to those to whom the Act of 1865 applied (See Preamble note 5)

24. (S. 20) Kindred or consanguinity is the connec-
 Kindred or con tion or relation of persons descended from
 sanguinity the same stock or common ancestor.

Kindred Kindred or consanguinity is the connection or relation of persons
 descended from the same stock To ascertain the kindred of a person who would
 be entitled on intestacy one has to find the nearest connection descended from a
 common ancestor, whether on the father's or mother's side (a) Consanguinity is
 of two kinds, lineal and collateral (b)

Next of kin The term next of kin is also used in the above connection and
 denotes the same thing The next of kin are those that are "next of blood that are
 not attainted of treason, or felony, or have any other lawful disability (c)" i. e. the
 nearest blood relations of the propositus in an ascending or descending line (d).
 The terms kindred or next of kin refer to relations by blood and not to those

(a) *Smith v Marry* 30 B 300
 (b) See Ss 25 and 26
 (c) Lord Coke in *Henric's Case* 9 Co

36 b. 39 b
 (d) *Hallon v Foster* 3 Ch 505. *Harris v*
Newton 46 L. J Ch 265

connected by marriage. Therefore a husband or wife is not entitled as next of kin but may claim under the Statute of Distribution in England or the Succession Act in this country. A gift to the next of kin under the Statute of Distribution or the Succession Act will exclude the widow (a) or the widower (b), or the mother-in-law or the step mother (c). This meaning does not prevail in Hindu Law according to which a wife is a kindred of her husband. This section therefore does not apply to Hindus (d). It should be remembered that the Succession Act contemplates only those relationships which the law recognises, i.e., those following from a lawful wedlock (e). There is no difference between persons related by the full blood and those by the half blood (f).

25. (S. 21). (1) Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.

(2) Every generation constitutes a degree, either ascending or descending.

(3) A person's father is related to him in the first degree, and so likewise is his son, his grandfather and grandson in the second degree, his great-grandfather and great-grandson in the third degree, and so on.

Change The last 'and' has been added in cl 1 and in cl 3 the word 'person's' has been substituted for the word 'man's' and the concluding words 'degree, and so on' have been added in this Act.

The section This is the definition given in Williams 'On Executors' who has taken it from Blackstone. Lineal consanguinity, therefore, means the relationship subsisting between a person and his ascendants or descendants in the direct line. It falls strictly within the definition of the term 'consanguinity' as given in the last section since lineal relations are such as descend one from the other, and both of course from the same common ancestor (g).

26. (S. 22). (1) Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

(a) *Garrick v Lord Camden* 14 Ves. 372, *Re Fitzgerald* 58 L. J Ch 662

(b) *Milne v Gilbert* 2 D G M & G 715, 23 L. J Ch 828

(c) *Rutland v Rutland*, 2 P W 216

(d) *Dines v. Bira*, 15 C W N 945, 950

(e) *Smith v Massey* 30 B 500, sold in *Blin v David* 51 I C 542, 12 Bar L T., 48

(f) See S. 27 (b).

(g) W 330 citing 2 Blackstone Comment. 203, see *Smith v Massey*, 30 B 500.

Illustrations.

(i) The person whose relatives are to be reckoned and his cousin german, or first cousin, are, as shown in the table, related in the fourth degree, there being one degree of ascent to the father, and another to the common ancestor, the grandfather, and from him one of descent to the uncle, and another to the cousin german, making in all four degrees

(ii) A grandson of the brother and a son of the uncle, *i.e.*, a great nephew and a cousin german, are in equal degree being each four degrees removed

(iii) A grandson of a cousin german is in the same degree as the grandson of a great uncle for they are both in the sixth degree of kindred

Change S 24 of the Act of 1865 ran as follows —“In the annexed table of kindred the degrees are computed as far as the sixth, and are marked by numeral figures ’ Then followed the above illustrations which formed the next three paragraphs of that section

The section. The table set out in Schedule I illustrates the mode of computation of degrees of kindred Those who stand in the same degree of kindred have an equal right to administration (S 219) but not to succession (see Ss 32 48) Computation of the degree of kindred in case of collaterals is to be made according to the rule laid down in S 96 (2) Some of the terms used in Schedule I will be found explained in S. 99

PART V.

Intestate Succession.

CHAPTER I.

Preliminary.

29. (S. 331.) (1) This Part shall not apply to any Application of intestacy occurring before the first day of Part. January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(S. 2. P. I. S. A. 8.) (2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India in all cases of intestacy.

Change. As to sub-sec. (1) see S. 331 cited under S 4 In sub-sec. (2) the word "Save" has been substituted for the word "Except," the words "in sub-section (1)" for the words "by this Act," the words "the provisions of this Part" for the words "the rules herein contained," and the word "intestacy" for the words "intestate or testamentary succession."

Sub-section (1). This Part deals with cases of intestacy and is based on Ss. 25 *sq.* of the Act of 1865 and on the Parsi Intestate Succession Act which latter is one of the enactments incorporated in this Act. This sub-section states that the Act is not to have any retrospective effect. The concluding words of the sub-section lay down that Hindus, *etc.*, are not to be governed by this enactment but by their personal laws (a). This shews the nature of the arrangement of the provisions of the Act which in spite of consolidation effects no change in the law.

Sub-section (2). This sub-section formed S 2 of the Act of 1865. The Parsi Intestate Succession Act (XXI of 1865 S 8) declared certain portions of the Act of 1865 to be inapplicable to the intestate succession of Parsis. That Act has been repealed but the provisions thereof have been included in this Act (b). The effect of the exceptions is that the provisions of this Part are applicable to those who were governed by the Act of 1865 and to Parsis. The Parsis are excluded by S. 31 from the operation of the next chapter. This Part it has now been held, will apply to the intestate succession of a Hindu convert to Christianity (c).

30. (S. 25.) A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

As to what property deceased considered to have died intestate.

Illustrations.

(i) A has left no will He has died intestate in respect of the whole of his property.

(a) See s. 23 note.
(b) Now forming Ss. 30 and 50-56

(c) *Kamawati v Dighey*, 43 I A. 351 ;
43 A. 525

35. (S. 43). A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

The section. This section declares that the husband surviving the wife has the same rights in respect of her property, if she dies intestate as she has over his under S 33, *i.e.* he takes half or the whole of his wife's property according as the wife has or has not left any kindred (a). Therefore, wherever a widow is referred to in the following sections *e.g.* Ss 36, 37, 41, the same rule will apply to the widower in case the wife dies leaving him surviving; in fact the legislature might have added 'or the widower's as the case may' *e.g.* in S 36 For the corresponding English law, see Administration of Estates Act, 1925, 15 Geo. V. c 23. s 46

Effect of separation or divorce. Under S 24 of the Indian Divorce Act (IV of 1869, XXX of 1927) the effect of judicial separation is that the wife shall be "considered as unmarried, with respect to property of every description which she may acquire or which may come to or devolve upon her" Therefore, the wife, from the date of the order and so long as the separation continues, has full power of disposition in all respects as if she was an unmarried woman and no part of it goes to her husband in case of her death intestate (b). A sentence of divorce has also the same effect (c)

Distribution where there are lineal descendants.

36 (S. 29.) The rules for the distribution of the intestate's property (after deducting the widow's share if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.

Rules of distribution.

Change. The words "shall be . . . 40" have been substituted the words "are as follows —"

The section. The rules for distribution among lineal descendants are contained in Ss 37 to 40 and among collateral relations in Ss 42 to 43 It will be seen that the lineal descendants are entitled in priority to the collaterals The widow's share is to be ascertained according to the rule laid down in S 33 and is, in all cases, to be deducted first Where there is a widower surviving instead of a widow he is entitled to the same share as the widow (S 35)

37. (S. 30) Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

Where intestate has left child or children only.

(a) *Gent v. Guntl*, 871 C. 354
(b) See 29 & 31 Vict. c. 65, Ss 25, 26.

(c) *Prole v. Seady* 3 Ch. 220

The rule. The children stand first in the order of succession (leaving the widow's share out of consideration) and they exclude the father of the intestate though both stand in the same degree of kindred. They are entitled to the whole of the estate where there is no widow (or widower as the case may be) and no grandchildren by a deceased child

Legitimate and illegitimate children. The word child is to be taken as meaning a legitimate child, for the law contemplates legitimate relations only: *e.g.*, legitimate according to the law of the domicile of the intestate at the time of his death (a) A child legitimate by the law of the father's domicile but illegitimate according to the law of England is entitled to a share of the father dying domiciled in England (b) The legitimation (*e.g.*, by subsequent marriage) must be valid according to the law of the father's domicile at the time of his marriage and of the child's birth (c) For posthumous children, see S 27 note.

38. (S. 31.) Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among his surviving grandchildren.

Where intestate has left no child, but grandchild or grandchildren.

Illustrations

(i) A has three children, and no more, John, Mary and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one ninth

(ii) But if Henry has died, leaving no child then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

The rule. The section follows the English rule laid down in certain old cases (d) which are no longer regarded as authorities and provides for equal distribution among all the grandchildren where the intestate has left no child surviving. But it has now been decided in England that the grandchildren by the several children of the intestate in such a case shall take *per stirpes* and not *per capita* (e).

39. (S. 32.) In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree.

Where intestate has left only great-grandchildren or remoter lineal descendants

(a) *Doe v Vardill*, 5 B. & C. 451.
(b) *Re Goodman's Trust* 17 Ch D 266, cf. *Re Andros*, 24 Ch D 637
(c) *Re Grove* 40 Ch. D 216
(d) *Walsh v Walsh*, 1 Eq Cs Abr

249, *Bowers v Littlewood*, 1 P.W. 595, *Davies v Davies* 4 P.W. 50
(e) *Re Ross's Trust*, 13 Eq 266; *Re Naff* 37 Ch D 517, W. 1024, 12 Ed 1238, 11 Ed.

The rule. The section as also the two preceding ones deal with cases where the lineal descendants of the intestate stand in the same degree of kindred to him, *etc.*, none of them has died leaving issue (see S. 40), so that there is no question of representation. In such a case the nearer descendants, whether they are related as children (S. 37), grandchildren (S. 38), or great-grandchildren, or are all related in a more remote degree to the intestate (S. 39) will exclude the more remote and will take *per capita*.

Like manner. This means that the principle of distribution stated in S. 37 or S. 38 will apply and the nearest in degree will exclude the more remote. As the lineal descendants stand in the same degree of kindred there will be no representation and they will take *per capita*.

40. (S. 33.) (1) If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations.

(i) A had three children, John Mary and Henry. John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of A, intestate, one third is allotted to Henry, one third to John's four children and the remaining third to Mary's one child.

(ii) A left no child, but left eight grandchildren and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to

each grandchild, and the remaining one ninth is equally divided between the two great grandchildren

(iii) A has three children, John, Mary and Henry, John dies leaving four children; and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry, one third to Mary's child, and one third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren

(iv) A has two children, and no more, John and Mary. John dies before his father, leaving his wife pregnant. Then A dies leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and the posthumous child

Change. The two sub sections formed one section in the Act of 1865 being connected by the word "and"

The rule. This section is distinguished from the three preceding sections by the fact that lineal descendants herein contemplated do not all stand in the same degree of kindred to the deceased intestate so that there is representation of the interest of a deceased child. In such a case, sub section (1) states that the property is to be divided into the number of shares corresponding to the number of lineal descendants of the intestate who stood in the nearest degree of kindred to him, see illustrations (i) and (ii), or who, having been of the nearest degree of kindred to him, have died leaving lineal descendants who survived the intestate, see illustration (vi). Sub section (2) states that the property having been divided as above, those standing in the nearest degree of kindred to the intestate take *per capita*, one share each, the issue of a deceased descendant will have one such share divided equally among them, so they take *per stirpes*. It further states that, there will be representation in respect of a share or shares of the deceased issue of a deceased descendant of the intestate, see illustration (iii). Therefore in dividing the property of an intestate the number of lineal descendants of the nearest degree surviving him have to be ascertained as also the number of those who have died leaving issue, and the total thus arrived at will be the number of shares into which the property is to be divided. Those descendants of the nearest degree who are alive take a share each, an equal share is to be divided among the issue of each descendant of the same degree that is dead. In case any such issue of a descendant be dead, leaving more remote lineal descendants, the principle of representation will apply and the remote descendants will be entitled *per stirpes* to the share of their deceased parent.

English Law The English law is somewhat different. Under that law where there are no children but there are more remote lineal descendants, the property will be divided according to the number of children of the intestate who have left descendants and divided *per stirpes* among their descendants. Thus in illustration (ii), the grandchildren would not take *per capita*, but the property would be divided into as many shares as A. had children and the share of each child will be divided among his lineal descendants.

Distribution where there are no lineal descendants

41. (S. 34). Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48.

Rules of distribution where intestate has left no lineal descendants.

Change. The words 'shall be 48" have been substituted for the words "are as follows .—"

The section. Sections 42-48 determine the distributive share of the next of kin of the intestate in the absence of lineal descendants. Of course it is the residue after the deduction of the widow's share that will be available for such distribution (S 33) and the widower is entitled to the same rights as are enjoyed by the widow (S 35).

Where intestate's father living

42. (S. 35). If the intestate's father is living, he shall succeed to the property

The rule. The father stands in the same degree of kindred as the son, but becomes entitled to succeed in the absence of all lineal descendants. Where there is no widow surviving (a), he is entitled to the whole of the property of the intestate to the exclusion of others (b). Indian Christians are not at liberty to adhere to the Hindu law of succession, but the Hindu relations of a convert can succeed to his estate, where the Hindu wife renounces her claim the father becomes entitled to the property of the intestate (c) under this section

43. (S. 36). If the intestate's father is dead, but the intestate's mother is living and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Where intestate's father dead but his mother, brothers and sisters living

Illustration.

A dies intestate, survived by his mother and two brothers of the full blood John and Henry, and a sister Mary, who is the daughter of his mother but not of his father. The mother takes one fourth, each brother takes one fourth and Mary, the sister of half blood, takes one fourth

The rule. The father, it has been seen in the preceding section, excludes the brother and sister of the intestate, but the mother shares with them and the reason, it has been suggested, is that the mother by marrying might take the estate to her new husband (d). Even brothers and sisters of the half blood are entitled each to a share with the mother (e). Mother does not, however,

(a) See S 41 note (2).

(b) *Blackbrough v Durb* 1 P W 41 51

(c) *Adm-Gen v Anandachari* 9 M 466

(d) *Blackbrough v Durb* 1 P W 40

(e) *Jeays v Watson* 1 M & K 675

include a step mother or a mother-in-law, the latter is not of kindred at all to the intestate (a).

44. (S. 37). If the intestate's father is dead, but the intestate's mother is living, and if any

Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living.

brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each

deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration.

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each takes one fifth, the child of Mary takes one fifth, and the two children of George divide the remaining one-fifth equally between them.

The rule. This section differs from the preceding one by the fact that an issue has been left by the deceased brother or sister of the intestate. The rule says that the doctrine of representation will apply in such a case and the issue of the deceased brother or sister will divide equally among themselves the share of their deceased parent thus getting *per stirpes*, while the surviving brothers and sisters and the mother will take, *per capita* (b), a share each.

45. (S. 38). If the intestate's father is dead, but the

Where intestate's father dead and his mother and children of any deceased brother or sister living

intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister

shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration.

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister, Mary, and two children of a deceased brother, George. The mother takes one-third, the child of Mary takes one third, and the children of George divide the remaining one-third equally between them.

(a) *Rutland v. Rutland*, 2 P. W. 216, see S 24 note

(b) See *Kellway v. Kellway*, 2 P. W. 344, cited under S 33.

The rule The section differs from the preceding one by the fact that the brothers and sisters of the intestate are all dead but have left issue behind. Then the division is to be made as stated in S 43 the mother takes her share and one share is divided among the issue of each deceased brother or sister of the intestate. Thus in *Stanley v Stanley* (a) the intestate left a wife a mother, and several nephews and nieces the children of a deceased brother. Although there was no brother or sister surviving still the nephews and nieces were entitled to one fourth to be equally divided among them the mother to one fourth and the widow to a half.

46 (S. 39) If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

Where intestate's father dead but his mother living and no brother, sister nephew or niece

The rule It has been noted above (S 43 note) that a step mother or a mother in law is not entitled like the mother to claim any part of the estate of the intestate not being related to him (or her) by blood (b)

47. (S 40.) Where the intestate has left neither lineal descendant nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where intestate has left neither lineal descendant nor father nor mother

Change The words shall be have been substituted for the word is.

The rule It will be seen that the brother and sister are preferred to the grandmother (c) and to the grandfather (d) though all are in the second degree of kindred. The rule here is the same as in England. Brothers and deceased brothers children take *per stirpes* (e).

48 (S 41.) Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Where intestate has left neither lineal descendant nor parent nor brother nor sister

Illustrations

(i) A the intestate has left a grandfather and a grandmother and no other relative standing in the same or a nearer degree of kindred to him. They are in the second degree will be entitled to the property in equal shares exclusive of any uncle or aunt of the intestate uncles and aunts being only in the third degree.

(a) 1 Ark 455
(b) *Rullan v Rullan* 2 P W (216)
W 1242 11 Ed

(c) *Winchelsea v Donisthe* 2 F & M 95
(d) *Feeling v Feeling* 3 Ark 712
(e) *Lewis v Lewis* 19 Bear 34

(ii) A, the intestate has left a great-grandfather, or a great grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares

(iii) A, the intestate, left a great grandfather, an uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares

(iv) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They will each take one-eleventh of the property.

Change The word "Where" has been substituted for the word "If" and the word "has" has been added before the word "left"

The rule In the absence of relations mentioned in the section the rule is that the nearest in blood excludes the more remote. Thus (a) if the intestate has no nearer relation than a grandfather and an uncle, the former is preferred being nearer in degree (b), grandparents share with uncles and aunts (c), aunts and nieces, uncles and nephews share equally (d), a grandfather by the father's side and a grandmother by the mother's side take in equal shares (e). Relations by marriage, not being kindred, are excluded from participation (f). It should be noted that there is no provision in the rule for the application of the doctrine of representation in the case of collaterals to whom the section applies. Thus, if an intestate leave an uncle and another deceased uncle's son, the former excludes the latter (g), so a nephew or a niece excludes the children of a deceased nephew or niece (h).

49 (S 42.) Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share.

Change The word 'is' before the word 'claimed' has been substituted for the words "shall be"

CHAPTER III.

SPECIAL RULES FOR PARSI INTSTATES.

Sections 50-56 and Schedule II contain special rules as to intestate succession among Parsis and have been taken from the Parsi Intestate Succession Act (XXI of 1865). That Act received the assent of the Governor General on 10th April,

- (a) W. 1251 11 Ed
(b) *Blackborough v Davis* 1 P. W. 41
(c) *Lloyd v Trench* 2 Ves. Sen. 215
(d) *Id*
(e) *Blackborough v Davis* 1 P. W. 41

- (f) See S 43 note
(g) *Bowen v Littlewood* 1 P. W. 595
(h) *Pett v Pett*, 1 Salk. 250; W. 1252 11 Ed.

1865, and was passed to define and amend the law relating to intestate succession among the Parsis. That Act being consolidated with the Succession Act is now repealed. Prior to the passing of Act XXI of 1865 the Parsis in the town and island of Bombay were governed by English law (a), and the law applicable to Parsis in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience (b). For the Object and Reasons of the Act XXI of 1865, see Gazette of India 1865, p 219, and for Proceedings in Council, see pp 68, 99, 113, 154; and for the grounds for the passing of the Act see *Naoraji, v. Rogers* (c). The Act is defective, to make it harmonious, it has been observed, amendments are necessary in several respects (d). The Schedules attached to the repealed Act now form Schedule II of this Act.

50. (P. I. S. A. 1). Where a Parsi dies leaving a widow and children, the property of which he dies intestate shall be divided among the widow and children, so that the share of each son shall be double the share of the widow, and that her share shall be double the share of each daughter.

51. (P. I. S. A. 2). Where a female Parsi dies leaving a widower and children, the property of which she dies intestate shall be divided among the widower and such children, so that his share shall be double the share of each of the children.

The rule. Where a Parsi female dies intestate leaving property, real and personal her whole estate, on her death, vests in her husband and children in the shares specified in the section (e). It will be noted that the son and the daughter share equally in case of succession to a female under this section, whereas in case of succession to a male, the share of the son is much larger than that of the daughter (f).

52. (P. I. S. A. 3). When a Parsi dies leaving children but no widow, the property of which he dies intestate shall be divided amongst the children, so that the share of each son shall be four times the share of each daughter.

53. (P. I. S. A. 4). When a female Parsi dies leaving children but no widower, the property of which she dies intestate shall be divided amongst the children in equal shares.

(a) *Jhangli v. Perzhal*, 11 B 1, see *Payne & Co. v. Pirojshah* 13 Bom L. R 920 (The common law of England held to apply to Parsis in the town and island of Bombay).
(b) *Shapurji v. Donathoo*, 30 B 359;

7 Bom. L. R 938
(c) 3 Bom H. C. R. 1, 97-99
(d) *Manchester v. Mithal*, 1 B 505, 512.
(e) *Pestonji v. Khunshji*, 7 Bom L. R 207, 212
(f) See Ss. 50-52

The rule. The children of an intestate female Parsi take the property in equal shares (a); but each son of an intestate male Parsi under the previous section gets four times the share of each daughter (see also S 50).

54. (P. I. S. A. 5). If any child of a Parsi intestate has died in his or her lifetime, the widow or widower and issue of such child shall take the share which such child would have taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death.

Division of predeceased child's share of intestate's property among the widow or widower and issue of such child.

The rule. In case of death of a child during the lifetime of a Parsi intestate, the child's widow or widower and issue do not lose their right of succession to the estate of the intestate but are entitled to the share which would have devolved on the child if living at the intestate's death, i.e., by a fiction of law he is presumed to have died after the intestate. It is not a condition precedent to the application of this section that the child of the Parsi intestate should have died leaving a widow (or widower) and issue. Thus, where a Parsi intestate left him surviving a widow, sons, daughters, children of a predeceased son and the widow of another predeceased son who had died without issue, and a posthumous daughter was afterwards born to the intestate; held, that the childless widow of the deceased son of the Parsi intestate was entitled to a share in the estate of the Parsi intestate, such share according to S 55 being a moiety of that which her husband would have taken if he had survived the Parsi intestate, the other moiety of this share devolving on the surviving issue of the intestate, including the posthumous daughter and the children of the predeceased son of the Parsi intestate (b).

Widower. This term means, in this section, a widower relatively to the deceased wife only and without consideration of the fact or possibility of his remarrying, so that on remarriage he does not lose his right to a share in his deceased wife's estate (c).

55. (P. I. S. A. 6). Where a Parsi dies leaving a widow or widower, but without leaving any lineal descendants,—

Division of property when the intestate leaves a widow or widower, but no lineal descendants

(a) his or her father and mother, if both are living, or one of them if the other is dead, shall take one moiety of the property in respect of which he or she dies intestate, and the widow or widower shall take the other moiety, provided that, where both the father and the mother of the intestate survive him or her, the father's share shall be double the share of the mother;

(b) where neither the father nor the mother of the intestate survives him or her, the intestate's relatives on the

(a) *Shapurji v Rustumji*, 5 Bom L. R. 252

(b) *Mancherji v Mithubai*, 1 B 506
(c) *Jehangir v Perozba*, 11 B 1, 5.

1865 and was passed to define and amend the law relating to intestate succession among the Parsis. That Act being consolidated with the Succession Act is now repealed. Prior to the passing of Act XXI of 1865 the Parsis in the town and island of Bombay were governed by English law (a) and the law applicable to Parsis in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience (b). For the Object and Reasons of the Act XXI of 1865 see Gazette of India 1865 p 219 and for Proceedings in Council see pp 68 99 113 154 and for the grounds for the passing of the Act see *Naorji v Rogers* (c). The Act is defective to make it harmonious it has been observed amendments are necessary in several respects (d). The Schedules attached to the repealed Act now form Schedule II of this Act.

50. (P. I. S. A. 1). Where a Parsi dies leaving a widow and children, the property of which he dies intestate shall be divided among the widow and children, so that the share of each son shall be double the share of the widow, and that her share shall be double the share of each daughter.

Division of property among widow and children of intestate

51. (P. I. S. A. 2). Where a female Parsi dies leaving a widow and children, the property of which she dies intestate shall be divided among the widow and such children, so that his share shall be double the share of each of the children.

Division of property among widow and children of intestate

The rule. Where a Parsi female dies intestate leaving property real and personal her whole estate on her death vests in her husband and children in the shares specified in the section (e). It will be noted that the son and the daughter share equally in case of succession to a female under this section whereas in case of succession to a male, the share of the son is much larger than that of the daughter (f).

52. (P. I. S. A. 3) When a Parsi dies leaving children but no widow, the property of which he dies intestate shall be divided amongst the children, so that the share of each son shall be four times the share of each daughter.

Division of property amongst the children of male intestate who leaves no widow

53. (P. I. S. A. 4). When a female Parsi dies leaving children but no widower, the property of which she dies intestate shall be divided amongst the children in equal shares.

Division of property amongst the children of female intestate who leaves no widower

(a) *Jehangir v Perobai* 11 B 1 see *Payne & Co v Prolshah* 13 Bom L R 920 (The common law of England held to apply to Parsis in the town and island of Bombay)
(b) *Shapurji v Dossabhoj* 30 B 359

(c) 7 Bom L R 988
(d) 3 Bom H C R 1 97-99
(e) *Mancherji v Mithibai* 1 B 505 512
(f) *Pestonji v Khurshedbai* 7 Bom L R 207 212
(g) See Ss. 50 52

The rule. The children of an intestate female Parsi take the property in equal shares (a); but each son of an intestate male Parsi under the previous section gets four times the share of each daughter (see also S 50).

54. (P. I. S. A. 5). If any child of a Parsi intestate has died in his or her lifetime, the widow or widower and issue of such child shall take the share which such child would have taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death.

Division of predeceased child's share of intestate's property among the widow or widower and issue of such child.

The rule. In case of death of a child during the lifetime of a Parsi intestate, the child's widow or widower and issue do not lose their right of succession to the estate of the intestate but are entitled to the share which would have devolved on the child if living at the intestate's death, i.e., by a fiction of law he is presumed to have died after the intestate. It is not a condition precedent to the application of this section that the child of the Parsi intestate should have died leaving a widow (or widower) and issue. Thus, where a Parsi intestate left him surviving a widow, sons, daughters, children of a predeceased son and the widow of another predeceased son who had died without issue, and a posthumous daughter was afterwards born to the intestate, *held*, that the childless widow of the deceased son of the Parsi intestate was entitled to a share in the estate of the Parsi intestate, such share according to S 55 being a moiety of that which her husband would have taken if he had survived the Parsi intestate, the other moiety of this share devolving on the surviving issue of the intestate, including the posthumous daughter and the children of the predeceased son of the Parsi intestate (b).

Widower. This term means in this section, a widower relatively to the deceased wife only and without consideration of the fact or possibility of his remarrying, so that on remarriage he does not lose his right to a share in his deceased wife's estate (c).

55. (P. I. S. A. 6). Where a Parsi dies leaving a widow or widower, but without leaving any lineal descendants,—

Division of property when the intestate leaves a widow or widower, but no lineal descendants

(a) his or her father and mother, if both are living, or one of them if the other is dead, shall take one moiety of the property in respect of which he or she dies intestate, and the widow or widower shall take the other moiety, provided that, where both the father and the mother of the intestate survive him or her, the father's share shall be double the share of the mother;

(b) where neither the father nor the mother of the intestate survives him or her, the intestate's relatives on the

(a) *Shapurji v Rustomji*, 5 Bom L. R. 252

(b) *Mancherji v Mithibai*, 1 B 506
(c) *Jehangir v Perozba*, 11 B 1, 5.

directly or indirectly affecting the Hindu law in those matters to which the provisos relate, and thus from introducing changes which the Legislature did not contemplate" (a) The necessity of such restrictions will become apparent from a consideration of the fact that the English law has been used as the basis of the Indian Succession Act, an Act which was intended for persons governed by a wholly different system of laws and the wholesale application of the sections of that Act to wills of Hindus will have the effect, by a sidewind as it were of materially altering the law by which the Hindus are governed. The restrictions imposed by the clauses in the Schedule relate to (A) properties which are not transferable *inter vivos*, (B) right of maintenance, (C) the creation of an interest unknown to Hindu law, (D) the law relating to adoption, and (E) the law relating to intestate succession. The restrictions are directed against any enlargement of the testamentary capacity of the Hindus by the application of the sections of the Succession Act which are made applicable to their wills. As a consequence of the restrictions, in the case of Hindus their testamentary power is regulated by Hindu law (b), which governs not only questions as to the estate or interest sought to be given by will but also all questions as to the subject matter of the gift, *eg.* the power of a member of a Mitakshara family to make a gift by will, or the capacity of a donee, or the validity of a gift to unborn persons (c). The result, in short, is that a disposition valid under a section of the Indian Succession Act may become invalid if made by a Hindu testator because of these restrictions.

2 Cl (1) Nothing herein alienated *inter vivos*. These words declare that the testamentary power of a Hindu follows the right of alienation *inter vivos*. The former power, therefore, is not unrestricted but limited being fettered by restrictions. The extent and nature of the power of disposition by a Hindu testator is not a question to be determined upon any notion of public expediency or of custom or usage but depends on the extent of the power of alienation during life and therefore is to be decided rather by reference mainly to the principles of the Hindu law of gifts (d). As their Lordships of the Privy Council have observed in the *Tagore* case (e) — 'The introduction of gifts by wills into general use has followed in India, as it has done in other countries the conveyance of properties *inter vivos*, and even if wills are not to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred'. It should be remembered that it is not every species of property or every kind of interest that is alienable during life is also devisable by will. Thus a widow governed by the Mayukhya School may alienate movable property during life but not by will. Therefore, although there is a close relation there is not complete identity

- (a) *Alangamonjori v Sonamoni* 8 C 637, 10 C L R 459 see *Cally Nath v Chunder Nath* 8 C 378, 10 C L R 278.
 (b) *Sonatun v Juggutsoondree* 8 M I A 66 85.
 (c) *Beer Pertab v Maharajah Rajender* 12 M I A, 1, 37 8.
 (d) *Tagore v Tagore* 4 B L R O C 103, on app 9 B L R 377 P C, *Sonatun v Juggutsoondree* 8 M I A

- 66 85. *Beer Pertab v Rajender* 12 M I A 1, 9 W R P C 15, *Nana v Huree* 9 M I A 90.
 (e) 9 B L R 377 397 399, 1 A Supp. Vol 47, 68 69. See also *Beer Pertab v Rajender* 12 M I A 1, 38 9 W R P C 15 22, *Bai Molahoo v Mamabai* 24 I A 93 105, 21 B 709 721, *Nagalutchmee v Gopoo* 6 M I A 309, *Pitum Koonbat v Joy Kishen* 6 W R C R 101.

between the law of gifts *inter vivos* and the law of wills (a) in other words the two are not exactly co-extensive Accordingly it would perhaps be more correct to say that whatever is not alienable during life is not devisable, *e.g.*, the right of a reversioner (b), or properties dedicated in trust for the performance of religious trusts (c)

3. Where the right of alienation is limited Of course where restrictions are placed on the right of alienation *inter vivos* by Hindu law there the right of testamentary disposition is also absent, as illustrations the following may be taken into consideration —

(i) *Under Mitakshara law* A person governed by the Mitakshara law can not dispose of by will his undivided interest in coparcenary property (d), unless he is the sole surviving coparcener (e), but even then the disposition will be inoperative in case of birth of a posthumous son or subsequent adoption of a child (f) (but not so if the alienation was by gift *inter vivos*) Coparceners who have the entire ownership of the whole of coparcenary property may make a joint will (g) A will made with the consent of coparceners is inoperative (h) (though a gift *inter vivos* is good) Although ancestral property cannot be alienated and devised so as to defeat the interest of others to whom under Mitakshara law it passed by survivorship, yet self acquired property can be disposed of by will (i), even by a nuncupative will where the Hindu Wills Act did not apply to the complete disinherison of the heir (j)

(ii) *Under Dayabhaga law* There is no restriction on the right of alienation by the owner of property, whether ancestral or self acquired under this law whether by gift *inter vivos* or by will (k) A coparcener may also dispose of his interest in the joint family property (l)

(iii) *Stridhan* A woman during coverture has absolute power of disposition over his Sautayika Stridhan property (m) (gifts from relations at the time of marriage) In respect of other kinds Stridhan her power of disposal is during

- (a) *Bal Bishen v Asmatda* 111 A 164 177, 6 A 560 570 *Lakshman v Ramchandra* 71 A 181 194, 5 B 48, 61, 62, *Seth Mulchand v Mancha* 7 B 491
- (b) *Sham Sunder v Achton* 251 A 183, 21 A 71, 2 C W N 729, *Ramasami v Ramasami* 30 M 255
- (c) *Bishen v Nadir* 151 A 1 15 C 329
- (d) *Villa v Yamenamma* 8 M H C R. 6, *Lakshman v Ramchandra* 5 B 48, 71 A 181, *Hiralal v Bat Mani* 29 B 351 *Lalla Prasad v Sri Mahadeoji* 42 A 461, 581 C. 667, 18 A L J 503
- (e) *Nagalutchmee v Gopoo* 6 M I A 369
- (f) *Venkatanarayana v Subbimal* 431 A 20 39 M 107, 321 C 373, *Parmanand v Sheo Charan* 2 Lah. 69, 591 C. 256 21 P L R 1921 (adopted son), *Hanmant v Bhama charya* 12 B 105, *Min khl v I'iroppa* 8 M 89, *Bchoo v Man korchal* 29 B 51 on app 31 B 373, 11 C. W N 769, 17 M L J 843

- (posthumous son)
- (g) *Lakshmi v Anandi* 45 A 245
- (h) *Lakshmi v Anandi* 531 A 125, 48 A 313 951 C 566, *Bhikhabhai v Purshottam* 50 B 553 961 C. 421, *Subbatami v Ramamma* 43 M 824, 591 C 631
- (i) *Beer Perlak v Rajender* 12 M I A 1 38 *Rao Balwant v Ram Kishori* 251 A 54 20 A 267, 2 C W N 273 *Rajah Buben v Bawa Misser* 12 B L R P. C. 430 (Mithila law)
- (j) *Sukhaya v Suraya* 10 M 251
- (k) *Tagore Case* 9 B L R 377, *Nagalutchmee v Gopoo* 6 M I A 309, *Beer Perlak v Rajender* 12 M I A 1 But see note 3 below
- (l) *Nagalutchmee v Gopoo* 6 M I A. 309 344, *Sartol v Decol*, 151 A 51 10 A 272 283
- (m) *Venkata v Venkata* 2 M 333 P C. *Bhas v Raghunath* 30 B 229, *Minia v Puran* 5 A 310, *Sham v Janki* 361 A. I. 36 C. 311, 11 C. 126, M. J. 137, 6 Ed.

coverture subject to her husband's consent but on his death her power of disposal becomes absolute (a).

(ii) *Testamentary power of a woman succeeding to a male.* Except in the Bombay Presidency, a woman who succeeds to property as heir whether to a male or to a female has no power of disposition over such property, whether movable or immovable. Thus, a widow (b), a mother (c), or a daughter (d), takes only a restricted estate. In the Bombay Presidency a woman, other than a widow, mother, daughter-in-law, or widow of a *Gotraja Sapinda*, inheriting property from a male or female, has absolute power of dealing with it (e). Paternal grandmother inheriting from her maiden grand daughter takes an absolute interest in such property (f). Among the Jains a sonless widow of a *Saoregi Agarwalla* takes an absolute interest in the self-acquired property of her husband (g), in case of ancestral property she takes only a limited interest (h).

(v) *Testamentary power in respect of movables.* A father under Mitakshara law may dispose of a small portion of ancestral movables by way of gift but not by will (i). As to the right of alienation by a widow over movable property inherited by her, according to Mithila School her right of disposal by an act *inter vivos* (j) is absolute but not by will (j), nor is she allowed dispose of by will according to Dayabhaga (l), or in Madras (m), or in Bombay (n) under Mitakshara law, or according to Benares School (o), or under the Mayukha law (p), unless a power was given to her by her husband (q), though it was recognised in earlier cases (r).

(ii) *Impartible estates.* The owner of an impartible estate may under certain circumstances and in the absence of a custom to the contrary alienate it by will. Inalienability does not follow from impartibility (s).

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| <p>(a) <i>Bhau v Raghunath</i>, 30 B 229, <i>Salem v Lutchmana</i>, 21 M 100, <i>Bity Indar v. Janki</i>, 5 I A 1, 15, 1 C. L. R 32, <i>Venkata v Venkata</i>, 1 M 281, 286</p> <p>(b) <i>Moniram v Kerry</i> 7 I A 115 154, 5 C. 776 789, 790; <i>Venkayamma v Venkataramanayamma</i> 29 I A 156, 25 M 678, 4 Bom L R 657, 7 C. W. N 1, <i>Gurunath v Krishnaji</i>, 4 B 462</p> <p>(c) <i>Vrjshukandas v Parvati</i>, 32 B 26, 9 Bom L R 1187, <i>Julessur v Uggur</i>, 9 C 725, 12 C. L. R 460, <i>Poorndia v Hemangini</i>, 36 C 75, 12 C. W. N 1002.</p> <p>(d) <i>Chotayal v Churno</i>, 6 I A 15, 4 C. 744</p> <p>(e) <i>Balwan v Baji Rao</i>, 47 I A 213, 43 C. 20, <i>Vithappa v Saciti</i>, 34 B 510, 12 Bom L R 487 (daughter); <i>Rindabal v Anacharya</i> 15 B 206 (nephew), <i>Madhocrum v Dace</i>, 21 B 739 (niece grandniece) <i>Trevelyan Hindu Law</i>, 502 6 3 Ed</p> <p>(f) <i>Gandhi v Bal Jodab</i> 24 B 192, 1 Bom L R 574 fold in <i>Narayan v Wamar</i> 46 B 17, 23 Bom L R 547 (widow of a sapinda inheriting from a female)</p> <p>(g) <i>Sheo Singh v Dakho</i> 5 I A 87, 110,</p> | <p>1 A. 688, <i>Harnabh v Mandil</i>, 27 C. 379</p> <p>(h) <i>Shunbhu v Gayan</i> 16 A 379.</p> <p>(i) <i>Parvatibai v Bhagwant</i>, 39 B 593, 31 I C 280, <i>Sabbaram v Ramamma</i> 43 M 624, 59 I C. 681, <i>Patra v Snnicosa</i> 40 M 1122 40 1 C 118 <i>Mulla Hindu Law</i> 422 6 Ed</p> <p>(j) <i>Birajun v Luchmi</i>, 10 C. 392</p> <p>(k) <i>Chamanlal v Ganesh</i> 28 B 453</p> <p>(l) <i>Durga v. Chinlamani</i>, 31 C. 214, 8 C. W. N 11, <i>Thakoor Deyhee v Baluk</i>, 11 M 1 A 139, 175, 10 W R. P. C. 3, 9</p> <p>(m) <i>Narasimha v Venkatadri</i>, 8 M 290, <i>Venkanna v Narasimham</i>, 44 M 984</p> <p>(n) <i>Pandhannath v Gocind</i>, 32 B 59, 9 Bom L R 1305</p> <p>(o) <i>Bhagvandeem v Myna</i>, 11 M 1 A 437, 9 W R. P. C. 23</p> <p>(p) <i>Chamanlal v Ganesh</i>, 28 B 453, 6 Bom L R 460</p> <p>(q) <i>Attilal v Ratilal</i>, 21 B 170</p> <p>(r) <i>Bhagratibai v Kohnujar</i>, 11 B 245 297, <i>Damodar v Purmanandas</i> 7 B 155, 163 <i>Trevelyan Hindu Law</i> 507-8 3rd Ed</p> <p>(s) <i>Venkata v Court of Wards</i> 26 I A 83, 22 M 383</p> |
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the defeasance of a prior absolute estate contingently upon the happening of a future event (a) Property may be bequeathed by will to an infant or idiot or a person otherwise disqualified from inheriting because of personal disability (b) No person can take advantage of his own wrong a murderer cannot claim to succeed to his murdered father (c)

5 The test The test to be applied for determining the validity of a particular disposition is thus laid down by the Privy Council — 'Whatever may have formerly been considered the state of that (Hindu) law as to the testamentary power of Hindus over their property that power has now long been recognised and must be considered as completely established This being so we are to say whether there is anything against public convenience anything generally mischievous or anything against the general principles of Hindu law in allowing a testator to give property whether by way of remainder or by way of executory interest upon an event which is to happen, if at all immediately on the close of a life in being Their Lordships think there is not that there would be great general inconvenience and public mischief in denying such power and that it is their duty to advise Her Majesty that such a power does exist (d) One restriction however, still continues to be imposed on the testamentary power of Hindus viz on the power to perpetuate the legal course of succession to the property of a testator (e)

6 The right of adoption Only the widow is entitled to adopt under Hindu law. Power given by a testator to the executors to take a boy in adoption is invalid (f) A Hindu adopting a son does not deprive himself of any power he may have of disposing of his property by will There is no implied contract arising out of adoption not to make a will Inalienability does not follow from adoption A bequest to a son falsely designated as *aurasa* or natural born does not invalidate the gift to the designated person (g) Alienation by a widow prior to adoption if made for legal necessity or with the consent of the next reversioners is binding on the adopted son (h) but if not made on account legal necessity or with the consent reversioners it is valid only upto the date adoption unless the claim of the adopted son becomes barred by limitation (i) The rights of an adopted son arise after adoption He is not to be regarded as a posthumous son (j) An

- (a) *Krsforomoni v Narendro* 16 C 383
392 *Tarakesur v Soshi* 10 I A
51 9 C 952 *Lalit v Chukkun* 24
I A 76, 24 C 834 850 *Soorjee*
money v Denobundoo 9 M I A
123 *Tagore Case* 9 B L R 377
Bhoobun v Hurrish 5 I A 138
4 C 23 *Bissonauth v Bama* 12 M
I A 41 9 W R P C. 1 *Lakshmi*
narayana v Valliammal 34 M 250
111 C 167
- (b) *Koldeb v Hoomeer Marshall* 357 2
Hay 370
- (c) *Vedanayaga v Vedammal* 27 M
591
- (d) " " " " " " " " " " " "
- (e) " " " " " " " " " " " "

- 2 B L R O C J 11 *Tagore Case*
9 B L R 377 *Purna Shashi v*
Kaladhan 38 C 603
- (f) *Amrit v Surnomoye* 27 I A 128
27 C 996 on app from 25 C. 662
2 C W N 389 24 C 589 1 C
W N 345
- (g) *Venkata v Court of Wards* 26 I A
83 22 M 303 3 C W N 415
- (h) *Lakshmana v Lakshmi* 4 M 160
Anajal v Dalajal 19 B 36 *Moro*
Narayan v Balajal 19 B 609
- (i) *Lakshman v Radhabal* 11 B 609
Ramkrishna v Tripurabal 33 B 85
11 C 647 *Valdyanatha v Savithri*
41 M 75 42 I C. 245 F B.
Sakharam v Thema 51 B 1019
107 I C 265
- (j) *Bamundoss v Tarnec* 7 M I A 169

agreement by the person adopting with the natural guardian of the adopted son that a share of the former's property should go to his widow in lieu of maintenance is binding on the adopted son and such a disposition in favour of the widow is good (a). An agreement however between the widow adopting and the natural father of the adopted son is not binding on the adopted son (b) although in some cases it has been held binding (c).

A document not having any legal effect as a will may confer a valid authority to adopt if duly registered (d).

7. Intestate succession. The law as regards intestate succession is left untouched by the Hindu Wills Act. Succession to the property of an intestate therefore is governed by his personal law.

8. Clause 4 Marriage. See S 37 Proviso note 11 ante.

58. (1) (S 331). The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jaina; nor shall they apply to any will made before the first day of January, 1866.

(2) (S. 2.) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India applicable to all cases of testamentary succession.

1. Change. Cf S 331 cited under S 4.

2. Sub-section 1. The provisions of this Part dealing with the substantive law of wills have no application (1) to the wills of Muhammadans (2) to the wills of Hindus etc, save as provided in S. 57 and (3) to wills made before January 1, 1866. The exclusion of wills of Muhammadans and of wills made before 1st January, 1866 is absolute but in respect of wills Hindus etc the application of the provisions of this Part as set out in Schedule III is qualified in the manner set out in S 57, i.e. they apply to wills and codicils made after 1st September 1870 under clause (a) within the limits and territories mentioned in that clause under clause (b) to wills wherever made disposing of immovable property situate within those territories or limits and under clause (c) to wills of all Hindus wherever made after 1st January 1927.

3. Sub-section 2. It formed S 2 of the Act of 1865. It has been construed to mean that the Act is of universal application in cases of testamentary

- (a) *Lakshmi v Subramanya* 12 M 490
 sold in *Narayansami v Ramasami*,
 14 M 172. *Basava v Lingangauda*
 19 B 428. See *Ganapathi v Savitri*
 21 M 10.
 (b) *Jagannadha v Papamma* 16 M 400

- (c) *Ioling Bhasba v Indar* 16 C 556
Vishalakshi v Swaramien 27 M 577,
Raoji v Lakshmi Bai 11 B 381.
 (d) *Kondapalli v Mandapaka* A
 305 23 A L J 799
 38, 49 M L J 247

from illness or from any other cause, that he does not know what he is doing

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him or in whose favour it would be proper that he should make his will. A cannot make a valid will.

(ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument nor the effect of its provisions. This instrument is not a valid will.

(iii) A being very feeble and debilitated but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.

1. Change. The words 'and not' have been changed to "not being" before the word minor in the section. The words 'A person' in Exp. 3 have been substituted for the word "One" and the word "Intoxication" for 'drunkenness' in Exp. 4.

2. The section. The section relates only to wills governed by the Succession Act and therefore has no application to wills in respect of movable property of a person domiciled abroad (S. 5). It states that a will to be valid the testator must not be a minor and he must also possess what is called the testamentary capacity, which means that the testator must have a memory to recall the several persons who may be fitting objects of his bounty and an understanding to comprehend their relationship to himself and their claims upon him. This is what is meant by the words 'sound mind or a sound disposing mind' (a). It does not mean 'a perfectly balanced mind' but effect is given to the expression of the true mind of the testator and that involves a consideration of what is the amount and quantity of intellect which is requisite to constitute testamentary capacity. It is a question of degree to be solved in each particular case in reference to the particular will in question. Eccentricity must be disregarded for that does not imply testamentary incapacity (b). Divergence from the ordinary type may be expected in some cases. The test which is usually applied is: Was the mind labouring under a delusion (c)?

3. Every person. The will must be the expression of the testamentary intention of one person (d). Several persons may combine to make their testamentary dispositions jointly. Such dispositions however are regarded as the act of each individual testator and probate may be granted on the death of the first of the two or more makers of a joint will (e) in the absence of an agreement to the contrary (f).

- (a) *Woolmer v Daly* 1 Lah. 173 179, see post notes 3 & 4.
 (b) *Hope v Campbell* 1899 A. C. 114.
Pitkington v Gray 1899 A. C. 401.
Waring v Waring 6 Moo. P. C. C. 341 79 R. R. 73.
 (c) *Boughton v Knight* 3 P. & D. 64.
 See below n. 5 & n. 14.
 (d) *Hobson v Blackburn*, 1 Add. 274.

- (e) *Re Pazzl Smyth* 1898 P. 7, see W. 6 12 Ed.
 (f) *Stone v Hoskins* 1905 P. 194 cited in *M. Nakshi v Viswantha* 33 M. 406 20 M. L. J. 339, (1910) M. W. N. 48, which again is followed in *Jethabhai v Panshollam* 23 Bom. L. R. 393 61 I. C. 400.

4 Sound mind In order to constitute a sound disposing mind a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard but must also have the capacity to comprehend the nature of his property and the nature of the claims of others whom by his will he is excluding from participation in his property. Therefore it implies the capacity of recollecting who the relations are whom he is excluding of understanding their claims upon his regard and bounty and of deliberately forming an intelligent purpose of excluding them from any share of his property (a). He must not only be cognisant of the contents of the will but be in a position to exercise and must in fact exercise thought judgment and reflection respecting the Act he is doing (b). A man may act foolishly and even heartlessly (in making his will) if he acts with full comprehension of what he is doing the Court will not interfere in the exercise of his volition (c).

8 What constitutes sound disposing mind It has been held that the existence of bare consciousness is not enough (d). There must be volition and intelligent comprehension (e). A capacity to understand a question and give a rational answer to such a question does not make a person of such sound mind as to enable him to make a will for all purposes whatsoever (f). Mere capacity to sign a will is not enough but the testator must be able to understand his position to appreciate his property and to form a judgment with respect to the parties whom he chooses to benefit by his will after his death (g). It is not necessary however to be in possession of full physical vigour (h). Sound disposing mind therefore means a mind of natural capacity not unduly impaired by old age enfeebled by illness or tainted by morbid influence (i). The presence of monomania or insane delusions (j) or an attack of epileptic fits (k) does not necessarily affect the will. A man may be capable of transacting business of a complicated and important kind involving the exercise of considerable powers of intellect and yet be subject to delusions so as to unfit him to make a will (l). Contractual capacity does not establish testamentary capacity (m).

6 Testamentary capacity is a relative thing The question to be determined is not whether the testator had full capacity for will making but

- (a) *Harwood v Baker* 3 Moo P C 282
291 cited in *Womesh v Rashmon*
21 C 279 and in *Lila v Bijoy* 41
C L J 300
- (b) *Dufour v Croft* 3 Moo P C 136
Hastings v Slope 1 P & D 64 65
Nambermall v Pasumali 281 C
909 (Halsbury cited)
- (c) *Motibai v Jamseljee* 29 C W N
45 801 C 777 P C
- (d) *Sala Malomed v Dam Janbai* 22 B
17 P C
- (e) See notes (2) (4) *Womesh v Rashmon*
21 C 279 305 307 on app
25 C 824 2 C W N 321 *Jogesh v Bhiku* 721 C 88
- (f) *Marsh v Tyrell* 2 Hag 84 122
Womesh v Rashmon 21 C 279
Jogesh v Bhiku 721 C 88
- (g) *Seflon v Hopwood* 1 F & F 579

- Susil v Apsar* 19 C W N 826
Surendra v Rani 47 C 1043
Womesh v Rashmon 21 C 279
291-3 *Harwood v Baker* 3 Moo P
C 282 290 *Lila v Bijoy* 41 C
L J 300
- (h) *Sayd Ali v Ibad Ali* 221 A 171
23 C 1
- (i) *Smith v Tebbit* 1 P & D 398
- (j) *Ibid Smees v Smees* 5 P D 84
Banks v Goodfellow L R 5 Q B
549 See n 15 below
- (k) *Mallappa v Tipava* 32 Bom L R
1249 1281 C 545
- (l) *Smees v Smees* 5 P D 84 *Boughton v Knight* 3 P & D 64 *Hope v Campbell* 1899 A C 1
- (m) *Monasseh v Shapurji* 10 Bom L R
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whether he had the capacity to make the disputed will in question (a) Thus, a person suffering from a paralytic affliction and therefore not in one sense in his "full senses" might be capable of making a will of a simple character, although not fit to originate and to comprehend all the details of a complicated one (b)

7. Will prepared by another according to testator's directions. A much lower degree of capacity is sufficient for the validity of such a will Where a testator is of sound disposing mind when he gives instructions for a will, but at the time of signature accepts the instrument drawn in pursuance thereof, even though not able to follow its provisions then, slight proof of knowledge and approval will suffice to validate the will (c) A will prepared according to instructions is valid though at the time of execution the testator merely recollects having given instructions but believes the will he is executing to be in accordance with them (d) It would be even sufficient if it is proved that the testator had approved of the will although there might be no direct evidence as to his giving any instructions (e).

8 Minor The will of a minor is a nullity (f) Minority for the purpose of testamentary capacity extends to the age of 18, unless a guardian has been appointed when minority ceases at 21 (see S 2 e) It has been laid down that a Hindu minor, though not governed by the Hindu Wills Act, cannot yet make a will unless he has attained the age of majority for making a will as determined by the Indian Majority Act (g) Under English law minority ceases at 21 Privileged wills can be made if the testator has completed the age of 18 (S 65) Onus lies on the party propounding a will to prove, *inter alia*, that the testator was not a minor at the time it was executed (h)

9 Explanation 1 In England before the Married Women's Property Act, 1882, (45 & 46 Vict c 76), a married woman could not make a will except under certain circumstances That Act removed her disability and conferred on her a general disposing power by will and otherwise The subsequent Act of 1893 (56 & 57 Vict c 63), removed the last vestiges of restrictions on her testamentary incapacity. In respect of Hindu women the Explanation has no application, for their testamentary capacity is regulated by and depends on their power of alienation under Hindu law (i) Act III of 1874 declares that the earnings of married women are to be their separate property but the Act does not apply to Hindus, Muhammadans, Buddhists, Sikhs and Jains A married woman of whose person and property a

- (a) *Saradindu v Sudhir* 50 C 100, 35 C L J 569
 (b) *Sajid Ali v Ibad Ali* 22 I A 171, 23 C.1, *Womesh v Rashmoni* 21 C 279, 294, citing *Darnell v Corfield*, 1 Rob 51
 (c) *Susil v Apsari*, 20 C. L. J 501, 19 C W N 826, *Namberumal v Pasumarty*, 28 I C 959, *Kusum v Satishendra* 13 C W N 1128, 3 I C 787, *Saradindu v Sudhir*, 50 C 100, 35 C. L. J 569
 (d) *Parker v Felgate*, 8 P D 171, *Perera v Perera*, 1901 A C. 354,

- told in *Jarat v Bissesar*, 39 C 245, 256, *Woolmer v Daly*, 1 Lah 173
 (e) *Baikuntha v Prasannamoyi* 27 C. W N 797 P C., See S 61 note.
 (f) *Kondapalli v Alandapaka*, 52 I A 305, *Jagannatha v Kunja*, 48 I A 482, 26 C. W N, 374 told
 (g) *Krishnamachariar v Krishnamachariar*, 38 M 166, *Hardwar v Gomi*, 33 A 525
 (h) *Rajindar v Ramjorai*, 5 Lah 263, *Bhagirath bai v Vusmanath*, 7 Bom L R 92 told
 (i) See Sched III cl. (1) note (2).

guardian has been appointed and who has not attained the age of 21 years is a minor (a).

10 Explanation 2 A person who is from birth deaf and dumb is presumed to be an idiot and therefore incapable of making a will (b), but the presumption may be rebutted and the person shewn to have capacity to understand what is written down (c) Thus, where a testator, though deaf and dumb, communicates his testamentary instructions by signs and motions and in conformity with such instructions a will is duly prepared and executed by the testator the will is good, but an affidavit stating the nature of the signs and motions by which the instructions were communicated might be demanded by the court (d) One not born deaf and dumb, can make a will in writing with his own hand, or if he cannot write then he is in the same case as those which be both deaf and dumb by nature, i.e. if he have understanding he may make his testament by signs otherwise not at all (e) Persons who can speak and cannot hear or those who are speechless only and not void of hearing may make their wills themselves in writing or by signs if they are unable to write (f) Where a testatrix became incapable of reading or writing owing to an apoplectic stroke and only assented by nods of her head and several pressures of her hand in answer to questions put to her by the person drawing up her will and the testatrix put her mark with a pen instead of her signature, *held*, if the court was satisfied that the will was in accordance with the wishes of the testatrix it was good (g)

11. Blind persons As a blind person cannot see and therefore cannot read what is written down for him the court must be satisfied as to the clear knowledge and approval of such a person of the contents of the will, though it is not necessary to show that the identical paper which the testator executed as his will was read over to the blind man (h)

12 Explanation 3 The expression unsound mind is not to be understood in a medical sense It is a legal expression and denotes an incapacity to manage one's affairs It answers to the old legal term, *non compos mentis*, which is equivalent to 'no sound memory' (i) The words comprehend (1) imbecility or idiocy whether congenital or arising from old age and (2) lunacy or mental alienation resulting from disease (j) The former kind of unsoundness of mind comprises cases arising from want of intelligence occasioned by defective organisation or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement (k)

13 Insanity Insanity was formerly divided into two kinds (1) total and (2) partial, or as it came to be called later, monomania (l) But this distinction

- (a) *Re Miranda* 28 C W N 527, 81 I C 1008
 (b) W. 12, 11 Ed, J 23
 (c) J 53
 (d) *Re Omston* 2 Sw. & Tr 461, 31 L J P 171 *Re Geale*, 3 Sw & Tr 431, 33 L J P 125
 (e) W 12 13 11 Ed
 (f) W. 13 11 Ed
 (g) *Re Hollam* 108 L T 732, see *Ryan v Ryan* 7 C. W N 221
 (h) *Fincham v Edwards* 3 Curt, 63, on

- app 4 Moo P C 198, see *Mitchell v Thomas* 6 Moo P C 137 *Re Arford* 1 Sw & Tr 540 W 13 14, 11 Ed J 53 4 7 Ed
 (i) Co Litt 246 (b)
 (j) *Re Cowasji* 7 B 15
 (k) *Banks v Goodfellow* L R 5 Q B 549, 566
 (l) *Dow v Clark* 1 Add, 279 3 Add 79, *Waring v Waring* 6 Moo P C 341

has not been seized (a). This, however, only means that where the mind possesses sufficient power to take into account all considerations necessary to the proper making of a will but is a prey to some delusion not affecting the general faculties and not operating in regard to any particular testamentary disposition, a person does not lose his testamentary capacity (b). But where the insane delusion is with regard to persons who would be the natural objects of the testator's bounty then a will made during the presence of such delusion will be invalid (c). Mere weakness of mind does not constitute unsoundness of mind. A lunatic within the meaning of Act XXV of 1873 (Administration of Estates of Lunatics), must be incapable of managing his own affairs and must also be of unsound mind (d).

14 Delusion. The question of insanity is a mixed one partly within the range of common observation and partly within the range of special medical experience (e). A will prompted by insane delusion or delusions existing in the mind of a testator and influencing his will, thereby inducing him to make a disposition which he would not have made if he had been of sound mind, cannot stand (f). A man may be said to be under a delusion, when he only labours under a mistake and a belief in facts which no rational person would have believed. A morbid or insane delusion means a pertinacious adherence to some delusive idea in opposition to the plain evidence of its falsity (g). The only delusion which proves insanity are insane delusions. In order to constitute an insane delusion, it must be shown, not only that the belief in it was unfounded but that it was so destitute of foundation that no one except an insane person could have entertained it (h). The delusion must be such as to influence the testator's decision as to the disposal of his property and disturb the exercise of the faculties necessary for such an act (i). A lunatic, it should be noted, may have capacity to execute a will but not to execute a deed (j).

15 Lucid interval. The will of a lunatic made during insanity is void (k). But even in the case of a person found by inquisition to be a lunatic, his will, if made during a lucid interval, will be good, i.e., if at the time of its execution the testator was of sound mind, memory and understanding (l). There must, therefore, be an intermission of the disorder at the time of execution of the will. General insanity does not affect a will, for until proof of habitual insanity is given the presumption is that the party was rational but where habitual

- (a) *Banks v Goodfellow*, L R 5 Q B 549, fold in *Boughton v Knight*, 3 P & D 64, and in *Murphy v Smith*, 12 P D 116.
 (b) *Banks v Goodfellow*, L R 5 Q B 549, see also *Smee v Smee*, 5 P D 84, *Jenkins v Morris*, 14 Ch D 674, *Hope v Campbell*, 1899 A C 1.
 (c) *Dew v Clark*, 3 Add 79, *Waring v Waring*, 6 Moo P C 341, *Smith v Tebbitt* 1 P & D 393, *Boughton v Knight*, 3 P & D 64.
 (d) *Mazharuddin v Serajuddin*, 4 C L J 115, *Re Cowasji* 7 B 15.
 (e) *Smith v Tebbitt*, 1 P. & D 398,

- 36 L J P & M 97.
 (f) *Hope v Campbell*, 1899 A C 17, *Banks v Goodfellow*, L R 5 Q B 549 565.
 (g) *Dew v Clark*, 1 Add 279, 3 Add 79.
 (h) *Sajid Ali v Ibad Ali* 22 I A 171, 23 C 1, *Jenkins v Morris* 14 Ch D 674 (case of grant of lease).
 (i) *Banks v Goodfellow*, L R 5 Q B 549 566.
 (j) *Re Walker*, (1905) 1 Ch 160, 172.
 (k) *Brogden v Brown*, 2 Add 441.
 (l) *Roe v Nix* 1893 P 55, *Hall v Warren* 9 Ves 605, *Smock v Watts*, 11 Beav 105.

insanity is established then the party alleging a lucid interval must prove it (a) Where the testator is proved to have been insane before the execution of the will the burden lies on the propounder to shew that it was made during a lucid interval (b), so also where a lunatic is found by inquisition The probabilities in favour of a lucid interval are infinitely stronger in case of delirium than in case of permanent proper insanity and the difficulty of proving a lucid interval is less, in the same exact proportion in the former, than in the latter case (c) The making of a rational will affords some evidence of its execution during a lucid interval (d) Where insanity has been proved to have existed the court should proceed with caution for the lucid interval may be in outward appearance only (e) The court should rely on facts proved by evidence to establish a lucid interval and not on the judgment of others (f) Lucid interval does not mean that a person would be restored to the same intellectual or mental estate which he enjoyed before the attack of the malady (g) On the other hand, The lucid interval must be a substantial though temporary recovery a mere cessation of the violent symptoms is not enough there must be restoration of the mind sufficient to enable the party soundly to judge of the act (h)

16. Presumption of insanity In the absence of any evidence to the contrary the testator will be presumed to be sane (i) This view however has not gone unchallenged (j) Thus, Jenkins J observes 'There is no presumption in law in favour of soundness of mind and the court in each case on the evidence given by both sides ought not to affirm that a document is the will of a competent testator unless it believes that it really is so (k) But the learned judge at the same time adds, 'Very slight proof of the testator's mental capacity is ordinarily necessary where proof of the *factum* is regular' The presumption in favour of sanity it has been pointed out in another case arises only in non contentious cases where it is sufficient to prove execution and rely upon the presumption of capacity (l) This greatly whittles down the value of the presumption

17 Explanation Intoxication A will of a person so drunk that he is deprived of the use of his reason and understanding cannot stand (m) But the will of a mad man who was addicted to liquor and under its influence talked

- (a) *Cartwright v Cartwright* 1 Phillim 90 100, *Mallappa v Tipapa* 32 Bom L R 1269 128 I C 545 (case of a man suffering from epileptic fits which brought about depression of mind)
 (b) *Cartwright v Cartwright* 1 Phillim 90 100, *White v Driver* 1 Phillim 84, 88
 (c) *Brogden v Brown* 2 Add (445) *Dimes v Dimes* 10 Moo P C 422 426
 (d) *Bannatyne v Bannatyne* 2 Rob 472 502, *Cartwright v Cartwright* 1 Phillim 90 fold, *Nicholls v Binns* 1 Sw & Tr 239 see *Dew v Clark* 3 Add 79
 (e) *Brogden v Brown* 2 Add, (445) *White v Driver* 1 Phillim 84 88
 (f) *Cartwright v Cartwright*, 1 Phillim

- 90 *Kindelside v. Hamson* 2 Phillim 459
 (g) *Ex p Holyland* 11 Ves 10
 (h) *Hall v Warren* 9 Ves 605, 611
 (i) *Groom v Thomas* 2 Hag 434 *Steed v Calley* 1 Keen 620 630 *Wamesh v Rashmoni* 21 C 279 on app 25 C 824 2 C W N 321 *Surendra v Rani* 47 C. 1043 24 C W N 860 This view has been adopted by eminent writers W 53 12 Ed Hals Vol 28 p 533 With regard to onus of proof see n 22 below
 (j) T 19 8 Ed
 (k) *Nawalmal v Dhanu* 5 Bom L R 327
 (l) *Mukta Bai v Woman* 69 I C 572.
 (m) *Wheeler v Anderson* 31 Ind 602, *Aire v Hill* 2 Add 206

and behaved like a mad man was held to the good (a). Where there was no evidence to indicate that the will of a person of intemperate habits was not made when he was not sober and that he was not of sound disposing mind when he was transacting the business of executing the will held the will was good. Evidence of testamentary capacity is not displaced by mere proof of serious illness and of general intemperance (b).

18. **Illness.** Illness is not in itself sufficient to invalidate a will unless it impairs the mind in such a manner as to deprive the executant of the power of understanding the nature and consequences of the act he is doing (c). Impaired physical vigour due to permanent paralytic affliction does not necessarily impair mental powers to such an extent as to render a person incapable of executing a will of a simple character (d).

19. **In extremis.** The court must be careful to see that the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully complied with (e). In such cases the court laboured to scrutinize with care and caution the evidence as to the testator's testamentary capacity when he is said to have executed the will. The opinion of experts as to competency is entitled to little regard unless supported by good reasons founded on facts which warrant them (f). Thus the Privy Council minutely examined the evidence and even the hour of signature, as important in view of the testator's failing health, and held that the onus of proving that when the will was executed the testator was not too exhausted and ill for a testamentary act was not discharged (g).

20. **Any other cause.** Where the mental faculties of a person have been greatly enfeebled by physical weakness he may be capable of executing a will of a simple character though unfit to comprehend and originate the details of a complicated settlement. The will is not affected unless the evidence reasonably leads to the inference that he was incapable of understanding such business as falls to the lot of a Talukdar or of regulating the succession to his property (h). Mere old age does not deprive a man of his capacity to make a will (i), though it is conceivable that his intellect may be so impaired that he may become unfit to make a will (j). The question in these cases is: Is the testator equal to the important act of disposing of his property by will (k)? Similarly where the testator suffers from loss of memory (l). But mere weakness or infirmity of intellect is no ground of setting aside a will (m). In the absence any mental

(a) *Billinghurst v Vickers*, 1 Phillim 191 W 28 12 Ed

(b) *Bur Singh v Ullam Singh* 38 C 355, 365 7, See *Woolmer v Daly*, 1 Lah 173 177, 178

(c) *D J W T L* - - - - -

P C.
(d) *Sajid Ali v Ibad Ali*, 22 I A 171, 23 C 1 fold in *Woolmer v Daly* 1 Lah 173

(e) *Tayammaul v Sashachalla*, 10 M I A 429, 437

(f) *Susil v Apsari* 20 C L J 501, 19

C. W N 826

(g) *Sala Mahommed v Dame Janbai*, 22 B 17; 1 C W N 481, 24 I A 148, *Padma v Dharma* 15 C W N 728. See note next para

(h) *Sajid Ali v Ibad Ali*, 22 I A 171, 23 C 1 cl, *Haji Cassim v K B Dutt*, 19 C W N 45, 27 I C 459 (case of lease)

(i) *Bird v Bird* 2 Hag 142

(j) *Griffiths v Robins*, 3 Madd 191

(k) *Mountain v Bernet*, 1 Cox 356, *Mackenzie v Mandaside*, 2 Hag 211

(l) *Marquis of Winchester's Case* 6 Co 23a, 3 Rep 1.

(m) *Osmund v Fitzroy*, 3 P. W, 129.

derangement the enquiry into the capacity of a testator in extreme old age enfeebled by long illness or where death is fast approaching is simply whether the mental faculties retain sufficient strength to comprehend the act to be done (a)

21 Does not know, etc Testamentary capacity implies a sound mind memory and understanding(b) There must therefore be intelligence or understanding enough for the testator to appreciate the disposition of his property and to form an intelligent appreciation of the object of his bounty and of the claims of those whom he is excluding from any benefit (c) Further it is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents (d) otherwise probate will be refused (e)

22 Onus The onus of proof lies in every case upon the party propounding a will to satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator and that it was executed in accordance with the law (f) This point is firmly established and has become an accepted principle (g) The onus is in general discharged by proof of capacity and the fact of execution from which the knowledge of an assent to the contents of the instruments are assumed (h) The onus lies upon the person who sets up a will and not upon the person who is prepared to impeach it (i) The onus is not discharged by proving capacity to sign a will or to answer simple questions (j) or by proving the existence of bare consciousness (k) Where the terms are unusual and the evidence of testamentary capacity doubtful the vigilance of the court will be roused and it will require to be satisfied beyond all reasonable doubt as to the testamentary capacity of the testator (l) In cases of wills executed *in extremis* strong proof is required that the contents of the will were known to the testator (m) and that it was his spontaneous act (n) Strong

- (a) M 94 *Princep v Sombre* 10 Moo P C 247 278 *Mitchell v Thomas* 6 Moo P C 137 *Darnell v Cotfield* 1 Rob 51 *Harwood v Baker* 3 Moo P C C 282 *Trice v Trice* 1 Rob 775 *eld to*
- (b) *Boughton v Knight* 3 P & D 64 *Namberumall v Pasumart* 28 I C 959
- (c) *Boughton v Knight* 3 P & D 64 *Seston v Hopwood* 1 F & F 578 *fold in Susil v Apsari* 20 C L J 501 27 I C 276 *Harwood v Baker* 3 Moo P C C 282 290
- (d) *Hastlow v Stobbe* 1 P & D 64
- (e) *Bullin v Barry* 1 Curt 614 6 Moo P C 480 *Re Hunt* 3 P & D 250 See *Kuppayammal v Amman Ammal* 22 M 345 (will should be read over to the testator where it is not written by him)
- (f) *Barry v Bullin* 2 Moo P C 497 466 *Padma v Dharma* 15 C W N 728 *Shunmugaraya v Manikka* 36 I A 185 10 C L J 276 *Dattindav v Golah* 21 C L J 287 19 C W N 747 28 I C 574 *Bajewari v Rasik* 8 I C 531 *see Vahar v Bodha* 21 A 91

- Hope v Campbell* 1699 A C 1 *Surendra v Jahnair* 56 C 390 119 I C 17 As to the mode of discharging the onus see *Shambhu v Sukhrao* 112 I C 293
- (g) See *Rajindar v Ramjowa* 5 Lah 263 *foling Bhagathai v Viswanath* 7 Bom L R 92
- (h) *Barry v Bullin* 2 Moo P C 482 486 *fold in Lila v Kumar B Joy* 41 C L J 300
- (i) *Sukh Del v Kedar* 23 A 405 413 P C
- (j) *Susil v Apsar* 20 C L J 501 19 C W N 826
- (k) *Jogesh v Bhithu* 72 I C 88
- (l) *Bullin Kunwar v Bhagathi* 9 C W N 649 P C *Dufaur v Croft* 3 Moo P C C 136 *Harwood v Baker* 3 Moo P C C 232 *Tyrell v Panlon* 1894 P 151 *reld to in Susil v Apsa* 19 C W N 826 *Homesh v Rasmoni* 21 C 279 25 C 824
- (m) *Mitchell v Thomas* 6 Moo P C 137
- (n) *Archambault v Archambault* 1902 A C 575

proof is generally required in all cases in which circumstances exist which excite the suspicion of the court (a) If sufficient evidence has been adduced to establish the genuineness of the will and the capacity of the testator probate will be granted of the will (b) but if the evidence be conflicting then the proponent cannot be said to have discharged the onus that rests upon him and probate will be refused (c) As has been observed wherever circumstances exist which excite the suspicion of the court and whatever their nature may be it is for those who are propounding the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document and it is only when this is done that the onus is thrown upon those who are opposing the will to prove fraud and undue influence or whatever else they rely on to displace the case made of proving the Will (d)

The burden of proof is much greater where the testator has been subject to unsoundness of mind previous to the execution of the will (e), especially where the will is an inofficious one (f) i.e. one in which natural affection and the claims of near relationship have been disregarded (g) But probate will not be refused simply because the will is inofficious. The doctrine it has been held does not prevail in India (h) Where the fact that the testator has been subject to an insane delusion is established a will should be regarded with great distrust and every presumption should in the first instance be made against it Where insane delusion has been shown to have existed it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposition of his property (i) When a person is found to be a lunatic under Act XXXV of 1858 the presumption is that he continues to be of unsound mind until the contrary is shown (j)

If the conscience of the court upon a careful and accurate consideration of the evidence on both sides is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, the party propounding the will cannot be said to have discharged the onus that rests upon him and the court is bound to pronounce its opinion that the instrument is not entitled to probate (k) The onus is discharged if the court be able affirmatively on a review of the whole evidence to declare itself satisfied that the testator was of sound mind at the time of its execution (l) As to when the court should hold a will not

- (a) *Tyrell v Panton* 1894 P 151 J 54
39 7 Ed
(b) *Bama v Tara* 18 I A 132 19
C 65
(c) *Romes v Rajant* 21 C 1
(d) *Tyrell v Panton* 2 Moo P C 484
Re Gopessur 16 C W N 265 269
Lila v Bijoy 41 C L J 300
Sutton v Sadler 3 C B N S 87
Symes v Green 1 Sw & Tr 401
Mallappa v Tipava 32 Bom L R
1289, 128 I C 545
(e) *Smee v Smee* 5 P D 84
(f) *Harwood v Baker* 3 Moo P C C
282 291 *Banks v Goodfellow* L
R 5 Q B (570)

- (g) *Banks v Goodfellow* L R 5 Q B
(570)
(h) *Rammol v Hakol* 22 C. W N
315 43 I C 208
(i) *Smee v Smee* 5 P D 84
(j) *Amanchi v Amanchi* 33 I C 578
19 M L T 243 (case of adoption)
(k) *Baker v Ball* 2 Moo P C C 317
Panton v Williams 2 Curt 530 cited
in *Susil v Apsari* 19 C W N 826
27 I C 276, see *Bakuntha v*
Prasannamoy 27 C W N 797
P C
(l) *Sutton v Sadler* 3 C B N S 87
Padma v Dharma, 15 C. W N 728

to be genuine because the signature is forged, see *Lila v Bijoy* (a). It "is essential to take care that the decision of the Court rests not upon suspicion but upon legal grounds, established by legal testimony (b)". A very strong presumption arises in favour of a will where it has been acted upon and recognised by the members of the testator's family for a long time(c)

'That the testator did not know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by every one who propounds it as a will. This burden is satisfied, *prima facie*, in the case of a competent testator, by proving that he executed it. But if those who oppose it succeed by cross examination of the witnesses, or otherwise, in meeting this *prima facie* case the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can admitted to probate (d)''

60. (S. 47.) A father, whatever his age may be may by
 Testamentary will appoint a guardian or guardians for his
 guardian child during minority.

1 The section The section applies to the wills of Hindus etc

2 Father By Hindu as also by English law the father is the natural guardian of his minor children during their minority, but this guardianship is of the nature of a sacred trust and he cannot therefore during his lifetime substitute another person to be guardian in his place but remains the guardian notwithstanding that he affected to substitute another in his place. The authority conferred on such substituted guardian is revocable, the revocation depending on the interest and welfare of the infants, their parentage and religion (e). The section, however, does not deal with the appointment of a guardian during life but with that of a testamentary guardian taking effect after death. The power of appointing a guardian by will is given to the father alone by this Act. Under the Guardianship of Infants Act (f) of England a mother is competent to appoint a guardian after the death of herself and the father. Where guardians are appointed by both parents they are to act jointly. The English law has been followed in the case of European British subjects under the Guardians and Wards Acts, S 5 of which provides that if the father be dead or incapable of acting a mother is also competent to appoint a guardian and where guardians are appointed by both parents they are to act jointly. In view of the consolidation of the law of succession by the present Act it is not known why this provision of the Guardians and Wards Act, empowering a mother to appoint a testamentary guardian, is not incorporated in this Statute.

- (a) 41 C L J 300
 (b) *Sreeman v. Gopaul*, 11 M I A 28, 44; cited in *Motilal v Jamseljee* 29 C W. N 45
 (c) *Rajendra v Jogendra*, 14 M I A 67, 7 B L R 216, 15 W R P C 41 (27 years in this case)
 (d) *Cleare v Cleare*, 1 P. & D 655 cited in *Hormasji v. Dhanjishaw*, 12

- Bom L R 569, 572 and in *Bal-krishna v. Gopikabal*, 7 Bom L R 175, and in *Lila v Kumar Bijoy*, 41 C L J 300.
 (e) *Beasant v Narayanlah*, 30 T L R 560
 (f) 49 & 50 Vict c. 27, now considerably modified by 15 & 16 Geo V c. 45

3 Whatever his age In England it has been ruled that an infant parent can make an appointment by deed but not by will except in the case of a soldier or sailor who is entitled to make a privileged will (a) The section declares that a provision in a will appointing guardian of children by a minor parent is good though the will itself is not good (b)

4 Child The child may be born or may be in the mother's womb at the death of the appointor or may be conceived after the death of appointor (c) Where not made determinable on marriage of the infant the appointment may continue till the infant attains full age (d) Does the English law require the infant to be unmarried (e)? A father can not by will appoint a guardian of this illegitimate child (f)

5 A guardian or guardians Several persons may be appointed and if any die or renounce those who survive or are willing to act can act (g) Renunciation must be before acceptance (h)

6 How appointed No particular words are necessary for making the appointment It is enough if the intention be sufficiently expressed Thus where a testator having infant children requested his wife's sister if she should be alive at his death to take their management and care on herself held that the testator had appointed her to be the guardian of his infant children (i) A testator appointing a person 'guardian of the estate' of the infant children does not thereby constitute him a testamentary guardian (j) A guardian of a child cannot be appointed by a privileged will though the testator may be competent to make such a will (k)

7 Assignment of office A guardian cannot assign his office to another (l) but a guardian in case of his death may be authorised by the testator to appoint his successor (m)

8 Revocation of appointment Testamentary appointment of a guardian is not revoked by a subsequent testamentary appointment not executed according to the Statute and not directly importing revocation (n)

9 The grant of administration A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit preferably to a guardian elected by the children (o) It is not incumbent on such a guardian to take out probate as a condition precedent to his obtaining a certificate

(a) 7 & 8 Geo. V c. 38 S. 4 see H XVII p. 123 f n (i)

(b) Cf *Aondapalli v Mandapala* 42 C. L. J. 38 where it was laid down that the will was bad the testator being a minor but the authority to adopt given by the will was good

(c) 12 Car. II c. 24 S. 8

(d) *Mendes v Mendes* 1 Ves. Sen. 69 91 *Eyre v Countess of Shaftesbury* 2 P. W. 102 107

(e) See *Re Simpsons and Hall* 25 Ch. D. 432 491

(f) *Sleeman v Henson* 13 Eq. 36

(g) *Gray v Courtes of Shaftesbury* 2 P.

W. 107 107

(h) H XVII p. 124 *Ex p. Champney* 1 D. & C. 350 *O'Keefe v Casey* 1 Sch. & Lef. 106 held to

(i) *Miller v Harris* 14 S. M. 541 see *Mendes v Mendes* 3 Atk. 619 624

(j) *Re Norbury* 9 L. R. Eq. 134

(k) *Re Tollemache* 1917 1 245

(l) *Wilford v Wellish* 2 Swab. 533 536

(m) *Re P. mall* 2 P. & D. 379

(n) *Ex p. Earl of Ilchester* 7 Ves. 345 The application to change a guardian is to be made by petition

(o) *Re Morris* 2 Sw. & Tr. 360

under the Guardians and Wards Act (a) A paper purporting to be a last will duly executed, containing simply an appointment of a guardian of his children by a father and not disposing of personal property and not appointing an executor is not entitled to probate (b)

10 Powers and duties of guardians A testamentary guardian is guardian both of the person and the property of the infant (c) and as such has the right of realising rents and profits from and generally managing the minor's estate (d) He has power to spend a suitable sum for the maintenance of the minor (e) Where a testamentary guardian of a minor exists no one else can be appointed guardian under the Guardians and Wards Act (f)

11 Power of court Where no guardian has been appointed by the father the court can appoint one (g) if it thinks fit to act jointly with the mother The court may remove the mother or any other testamentary guardian if it be necessary for the welfare of the infant and appoint another guardian in his or her place (h) A father cannot by will appoint any one to be guardian of his illegitimate children (i) The court however in appointing a guardian of such children will take into consideration the wishes of their parents (j)

12 Appointment of guardians by Hindus and Muhammadans The right of a Hindu father to appoint a testamentary guardian is recognised in Calcutta (k), and in Allahabad (l) but not in Madras (m) nor in Nagpur (n) and has been held doubtful in Bombay (o) The right of a Hindu father does not arise by virtue of any Statute as neither this section nor the Guardian and Wards Act applies to the will of a Hindu (p) The will appointing the guardian must be valid (q) Even where the right is recognised by court a guardian cannot be appointed in respect of properties which are the ancestral private properties of the testator in which the minor will have a right by birth (r) nor in respect of properties dedicated to a religious trust (s) The choice of a testator is unrestricted and he can even exclude the mother from the guardianship (t) A mother under Hindu law has no authority to appoint a guardian (u) The rule is the same in respect of appointments by Muhammadan testators

- (a) *Pathan Ali v Bai Panibai* 19 B 832
 (b) *Re Morlon* 3 Sw & Tr 422, 3 L J P & M 87
 (c) 12 Car II c 24 S 9 *Beaufort v Berly* 1 P W 703 704 *Mathew v Brise* 14 Beav 341
 (d) *Beaufort v Berly* 1 P W 703 *R v Sherrington* 3 B & Ad 714 716
 (e) H XVII p 129 130
 (f) *Sayad Shahu v Hapija Begam* 17 B 560, *Re Sresh* 21 C 206
 (g) *Johnstone v Beattie* 10 Cl & F 42 122
 (h) *Re Mc Groth* (1893) 1 Cl 143 147 see Guardians and Wards Act VIII of 1892 amended by Act XVII of 1929 s 39
 (i) *Sleeman v Wilson* 13 Eq 36
 (j) *Hard v St Paul* 2 Brown & Ch Ca

- 563
 (k) *Doorga v Neelanund* 7 W R 74
 (l) *Debanand v Anandmani* 43 A 213
 (m) *Chidambara v Rangasami* 41 M 561 F B
 (n) *Jivandas v Rajtani* 1921 Nag 97
 (o) *Venkatraman v Janardhan* 52 B 16
 (p) *Budhimal v Moraji* 31 B 413 9 Bom L R 553
 (q) *Sayad Shahu v Hapija* 17 C 569
 (r) *Kanakasabal v Ponnusami* 21 I C 848
 (s) *Alagappa v Mangathai* 40 M 672
 (t) *Doorga v Neelanund* 7 W R 74 see *Budhimal v Moraji* 31 B 413 9 Bom L R 553 on app from 8 Bom L R 522 *Debanand v Anandmani* 43 A 213
 (u) *Venkatya v Venkata* 21 M 401 8 M L J 112

13. **Query.** A question may arise whether an appointment of a guardian can be made by a will which does not contain any disposition of property. In England a will as defined includes an instrument disposing of the custody of children whereas under the definition of the term as given in this Act S. 2 (A), a will must contain a disposition of property.

61. (S 48). A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Will obtained by fraud, coercion or importunity.

Illustrations.

(i) A falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour; such will has been obtained by fraud, and is invalid.

(ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

(iii) A, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(iv) A threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a will yet being so much under the control of B that he is not a free agent, makes a will, dictated by B. It appears that he would not have executed the will but for fear of B. The will is invalid.

(vi) A, being in so feeble a state of a health as to be unable to resist importunity, is pressed by B to make a will of a certain purport and does so merely to purchase peace and in submission to B. The will is invalid.

(vii) A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B.

(viii) A, with a view to obtaining a legacy from B, pays him attention and flatters him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

1. **The Section.** The section applies to Hindus, etc. A will, like a contract, must be a voluntary act of a capable person. Section 59 lays down that a certain disordered state of mind may prevent a person from knowing and understanding the nature of a testamentary act when he will be declared incapable

of making a will. The act of a person suffering from a mental derangement or physical infirmity cannot be termed a voluntary act, because of his incapacity to apply his mind properly to his act. This section deals with certain external factors which similarly prevent a will from being the voluntary act of a testator. Such a will is also declared to be void. The section and the illustrations embody the English law. The illustrations are not exhaustive (a)

2. Fraud. For definition, see Contract Act S 17. Prof Anson describes it as 'a false representation of fact made with a knowledge of its falsehood or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it' (b). A false representation which does not actually deceive does not amount to fraud. "If a testator be circumvented by fraud the testament loseth its force" (c). False representations to the testator of matters to the prejudice of a legatee or of the members of his family who are the natural objects of his bounty in order to induce the testator to make a particular will amount to fraud and invalidate a will (d), so also false representations respecting the character of an individual to a weak old man to induce him to revoke a legacy (e). In some cases where the heir presumptive by falsely representing that he would provide for the immediate relations succeeded in inducing the testator not to make a will or to revoke a will that has been made, the court gave effect to the wishes of the testator by holding the heir to be a trustee and the intended legatees as the beneficiaries (f). Of course it is only in clear cases of fraud that the doctrine will be applied (g). Where from fraud or inadvertence a testator has been induced to insert a clause in his will (h), or a clause is fraudulently inserted without his knowledge (i) or by forgery after his death (j), it is to be rejected if it be distinct and severable from the true part. But where the rejection of a part alters the sense of the remainder or renders it meaningless, *quære* whether the will is valid (k). Even in such a case it seems the part is to be rejected (l).

3 Will prepared by another. If no directions be given and the will is executed without knowledge of its contents, the will is bad (m). A will prepared in pursuance of instructions and executed by the testator in the belief that it

- (a) *McLison v Adm Genl* 7 M 515
- (b) Law of Contract
- (c) Swinh cited in *Allen v McPherson*, 1 H L C 191. See *Smith v Kay* 7 H L C 750, 779, 771. The principle applies to every case where influence is acquired and abused where confidence is reposed and betrayed. "The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client are but instances."
- (d) *Boyse v Rossborough* 6 H L C 249, 53
- (e) *Allen v McPherson* 1 H L C 191, 207. *Gorindasami v Kannammal*, 51 M. L. J 747, 99 I C 393
- (f) *Strickland v Aldridge* 9 Ves 516,

- Chester v Urwick* 23 Beav 407, *Re Pilevers* (1902) 1 Ch 403, *Re Stead* (1900) 1 Ch 237 (where the principle with its limitations is clearly laid down)
- (g) *McCormick v Grogan* L R 4 H L 62
- (h) *Allen v McPherson* 1 H L C 191
- (i) *Burton v Robins* 3 Phillim 455 note (b)
- (j) *Plume v Beale*, 1 P W 388
- (k) *Rhodes v Rhodes*, 7 A C 192, 193. See *Harter v Harter* 3 P & D 11, *Morell v Morell* 7 P D (70)
- (l) *Re Boehm* 1891 P 247, 251 see W 258. *9 Glrish v Rashara* 1 C. L. J 109
- (m) *Hastillow v Slovic* 1 P & D 64

represents his wishes when he is too weak to understand it is good (a) Words introduced by the writer of the will in good faith and which the testator does not intelligently appreciate do not make a will void (b) so also when in good faith the words of a will are misrepresented to the testator (c) Where words are inserted by mistake and there is no clear evidence that they were really brought to the mind of the testator, they will be omitted from probate (f) That a will has been read over to the testator affords a strong presumption that he understood and approved of the contents (e)

4 **Coercion.** For definition see Contract Act s. 15 Coercion or duress means putting a man in fear by committing or threatening to commit an act which imperils his life, or limb, or property. A man acting under such constraint or danger, whether actually inflicted or imminent cannot be a free agent and his acts are not voluntary, therefore his will is void (f) Coercion may consist in actual or threatened violence or even imaginary terrors sufficient to deprive the testator of free agency (g). But "a vain fear is not enough to make a testament void (h)

5 **Such Importunity testator.** All influences are not unlawful Persuasion, appeals to the affections or ties of kindred, appeals to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate and may be fairly pressed on a testator Pressure of whatever character, whether acting on the fears or hopes if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made Importunity or threats such as the testator has not the courage to resist moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne will constitute undue influence, though no force is either used or threatened In a word, a testator may be led but not driven; and his will must be the offspring of his own volition and not the record of that of some one else (i) A will therefore is not invalidated simply on the ground of its having been executed under pressure unless the pressure was such as the testator could not resist Illustrations (vii) and (viii) of the section practically lay down the rule which should guide all courts on the question of importunity and embody the English rule (j) Thus where a wife persuaded her husband to execute a will in supersession of a former one not so favourable to her but the influence was such as not to deprive the testator of the exercise of his judgment and volition, held it did not amount to undue influence (k)

(a) *Parker v Felgate*, 8 P D 171 See S 59 n

(b) *Rhodes v Rhodes* 7 A C 192, *Guardhouse v Blackburn* 1 P & D 109, *Harter v Harter*, 3 P & D 11

(c) *Collins v Elstone* 1893 P 1

(d) *Brisco v Baillie Hamilton* 1932 P 234, See *Thomas v Jones* 1928 P 162

(e) *Guardhouse v Blackburn* 1 P & D 109 *Clear v Clear* 1 P & D 655, *Beamish v Beamish* (1894) 1 Ir R 7, see *Bai Gungabal v Bhugwandas*, 32 I A 142, 29 B

530 (Summarised from Jarman p 34)

(f) *Boyse v Rossborough* 6 H L C 2, 44

(g) *Boyse v Rossborough* 6 H L C 2, 44

(h) W 29 sq 11 Ed

(i) *Hall v Hall* 1 P & D 481, see *Kinleside v Harrison* 2 Phillm 449, 551-2

(j) *Jajneswari v Ugreshwari* 11 C W N 824

(k) *Monson v Adm Genl*, 7 M 515

6 Undue Influence What is called here importunity generally goes by the name of 'undue influence' in English law For definition see Contract Act S 16 The expression however, is hard to define (a) The question as to what is undue influence is sometimes a difficult one (b) As has been said in the preceding paragraph all influences are not unlawful (c) Undue influence to defeat a will must not be such as arises from the influence of gratitude affection or esteem but it must be the control of another will over that of the testator whose faculties have been so impaired as to submit to the control of such other person so that the testator has ceased to be a free agent, and has adopted the will of the controlling party (d) It is difficult to determine in any case the point at which the influence of one mind upon another amounts to undue influence It is especially so in the case of husband and wife, and the burden of proving undue influence in such a case lies upon those who allege it (e) It is not sufficient to establish that a person has the power unduly to overbear the will of the testator It is necessary also to prove that in the particular case that power was exercised and that it was by means of the exercise of that power that the will, such as it is has been produced (f) It will thus be seen that undue influence avoids a will not because of the bare exercise of influence but because of the exercise of domination over the testator's mind or will so as to take away his free agency As has been said influence may be degrading and pernicious and yet not undue influence in the eye of law To be undue influence there must be coercion (g)

It must come under one or other of these heads coercion or fraud (h) Where persuasion stops short of coercion and the volition of the testator, though biased and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another, so that the testator is really carrying into effect his own intention formed without coercion or fraud the will is not affected (i) Moreover the undue influence must be an influence exercised in relation to the will itself not an influence in relation to other matters or transactions (j) e g a general assertion of the wife's commanding character and the husband's weakness goes for little (k) But this principle must not be carried too far The undue influence may be practised so contemporaneously with the will or connected with it as by almost necessary presumption to affect it (l) A person in the last days or hours of life may be so weak and enfeebled that any little pressure or mere talking to him at that stage and pressing something upon him may so fatigue the brain that the sick person may be

- (a) *Boyse v Rossborough* 6 H L C (50)
 (b) *Soyad Muhammad v Faltch Muham*
mad 22 C. 324 336
 (c) *Hall v Hall* 1 P & D 481
 (d) *Locell v Locell* 1 F & F 581,
Seffon v Hopwood 1 F & F 578,
Mcounlain v Bennet 1 Cox 355
Morison v Adm Genl 7 M 515
 (e) *Bank of Montreal v Stuart* 1911 A
 C. 120 137
 (f) *Wingrove v Wingrove* 11 P D 81
 cited in *Bandains v Richardson* 19 6
 A C 169 *Craig v Lamoureux* 1970
 A C 349, *Low v Guthrie* 1979
 A C 278 *Bur Singh v Ullam*
 Singh 331 A 13

- (g) *Wingrove v Wingrove* 11 P D 81
 (h) *Soyad Muhammad v Faltch Muham*
mad 22 I A 4 22 C. 324 336 7
 See *Govindasami v Kannammal* 51
 M L J 747 991 C 393
 (i) *Boyse v Rossborough* 6 H L C 2
 49 5) *Parfitt v Lamless* 2 P & D
 462
 (j) *Boyse v Rossborough* 6 H L C 2
Hall v Hall 1 P & D 481
Wingrove v Wingrove 11 P D 81
Morison v Adm Genl 7 M 515
 527 8
 (k) *Sala Mahomed v Dame Janbat* 22
 B 17 28
 (l) *Jones v God Ich* 5 Moo P C. 16 48

induced for quietness' sake to do anything. In such cases the coercion in fact may be of a small amount yet the will cannot stand (a). Questions of undue influence and incapacity are wholly different issues (b).

7. Evidence. Motive and opportunity for the exercise of undue influence by some persons and that some of them in fact benefited by the will are not enough. Such circumstances excite suspicion, but in order to set aside the will there must be clear evidence that undue influence was in fact exercised (c). The facts that the propounder of a will is the principal beneficiary under it and took a leading part in giving instructions for the will and in procuring its execution excite the suspicion of the Court requiring it to examine the evidence with great vigilance and scrutiny and probate will not be granted until the suspicion is removed (d). In order to set aside a will on the ground of undue influence it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis (e). A man may act foolishly and even heartlessly if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition. In cases of this description 'it is essential to take care that the decision of the court rested not upon suspicion but upon legal grounds established by legal testimony' (f). Attestation by servants is an element to be taken into consideration when there is reasonable ground for suspicion that the will is not the voluntary act of the testator but has been procured by undue influence of the members of family (g). A party is not bound to cross examine witnesses until evidence in support of a will is produced at the trial (h).

8 Suspicion from relationship to testator. Suspicion of undue influence arises from various causes (i), not the least important of which are cases (j) where benefits have been conferred on persons standing in a particular relationship with the testator. Such gifts are naturally viewed with the utmost jealousy by courts in order to guard against undue influence (k), e.g., wills in favour of husbands by wives, (l) in favour of medical attendants by patients (m), in favour attorneys by clients (n), in favour of a person attending the testator in the last stage of his illness (o), in favour of persons exercising spiritual ascendancy over the

- (a) *Wingrove v Wingrove* 11 P D 81,
Hapson v Guy 64 L T 778
(b) *Sayad Muhammad v Faltah Muham*
mad 22 I A 4 22 C 324, 336
(c) *Bur Singh v Ullam Singh*, 38 C
355 367, 21 M L J 100,
Mallappa v Tipava 32 Bom L R.
1289, 128 I C 545, *Saraf v Sakhi*
33 C W. N 374, 113 I C
471 P C
(d) *Vellasaamy v Sivaraman* 58 M
L J 114, 121 I C 230
(e) *Boyse v Rossburgh* 6 H L C 2 51
(f) *Sreeman v Gopal* 11 M I A 28 44,
Motbal v Jamseljee 22 A L J 98
P C 80 I C 777, *Romesh v*
Rajant 21 C I See *Leong v Leon*
121 I C 796 (disinheritance of eldest son).
(g) *Chofey Narain v Karorpal* 22 I A.

- (24), 22 C 519 532
(h) *Sukhdai v Kedar* 23 A 405 P C
(i) See *Seflon v Hopwood* 1 F & F
578
(j) See *Allcard v Skinner*, 36 Ch. D
145 183 (not a case of will)
(k) *Bal Gangabai v Bhugwandas* 29 B
530
(l) *Marsh v Tyrell* 2 Hag 84 *Boyse v*
Rossborough 6 H L C 2 *Morison v*
Adm Genl 7 M 515
(m) *Ashwell v Lomi* 2 P & D 477
Jones v Godrich 5 Moo P C 16
20 *Bal Gungabai v Bhugwandas*
29 B 530
(n) *Hindson v Heathnll* 5 D G M &
C 301
(o) *King v Abreu*, 40 I C 1034; 5 L
Bur B 141

testator (a), by a lady in favour of manager (b), in favour of persons exercising influence over the mind of the testator in any degree (c)

9 Undue influence in case of gifts or contracts and wills There is no presumption of undue influence from the relationship of the parties in case of wills so as to shift the onus on the legatee standing in such relationship to prove that the legacy was not obtained by undue influence as in the case of gifts and contracts (d) Thus a testamentary gift to a client by a solicitor is not as against the latter liable to all the same considerations as a gift to him *inter vivos* would have been A solicitor preparing a will is not disentitled to a gift under it (e), but the client would not be bound by a gift by deed (f) In *Lyon v Home* (g) a widow after seeing a spiritual medium was induced to make two gifts of £30 000 each to him and also a will in his favour *held*, the gifts only were bad This illustrates the distinction in the effect of undue influence on gifts by wills and gifts *inter vivos* So cases of undue influence in respect of gifts *inter vivos* have to be applied with caution in testamentary matters But where evidence has been given of undue influence in respect of a gift under a will the same rule will apply to both cases (h)

10 Issues in case of undue influence On an issue of undue influence rightly raised a court should consider whether the gift in question (1) is one which a right minded person might be expected to make (2) is or is not an improvident act on the donor's part (3) is such as to have required advice if not obtained by donor, and (4) whether the intention to make the gift originated with the donor (i)

11 Onus In order to establish a will three things must be proved, capacity, testamentary intention and execution The *onus probandi* is always upon those who set up a testamentary instrument, and when there are suspicious circumstances the evidence to prove the affirmative must be stronger than in ordinary cases *et passim* where legacies are given in favour of guardians, trustees, solicitors, doctors (j) Fraud cannot be presumed but stronger evidence is necessary in such cases than where all natural presumptions are in favour of the disposition (k), The general rules may be thus stated —(1) The onus is on the party propounding the will (l), (2) if a party writes or prepares a will under which he takes a benefit or if any other circumstance exists which excites the suspicion of the court, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the

- (a) *Huguenin v Baseley* 14 Ves 273,
Lyon v Home 6 Eq 655, *Parfitt v*
Lawless 6 P & D 462 *Mannu*
Singh v Umadal 12 A 523
(b) *Mirza Kurratulain v Pearsa Saheb* 32
1 A 244 33 C 116
(c) *Trimleston v D. Allen* 1 Dow & Cl
65, (the will was invalid as to part
only) W 32 11 Ed
(d) *Parfitt v Lawless* 2 P & D 462,
Craig v Lamoureux 1920 A C 349
(e) *Hindson v Heathcill* 5 D G M &
G 391
(f) *Willis v Barron*, 1902 A C 271.

- 6 C. W N cciv
(g) 6 Eq 655
(h) *Boyse v Rossborough* 6 H L C
(51), *Rhodes v Bate* 1 Ch 252
(i) *Mahomed Buksh v Hosseini Bbi*, 15
1 A 86 15 C 684, 693 (case of
deed)
(j) See *Smith v Kay* 7 H L C, 750
771, 779 *Ramanandi v Kalawall*
7 Pat 221, 107 I C 14
(k) *Jones v Godrich* 5 Moo P C 16
20 21
(l) *Ibid*

contents of the will, and it is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will (a). The onus is discharged by proof of capacity and the fact of execution from which knowledge of and assent to the contents are assumed (b). These rules ought to be closely adhered to (c). (3) If the testator was in a sound state of body and mind, the presumption is that he executed the will without coercion or undue influence (d). Undue influence is not to be presumed (e). It must not be understood, however that if a will is read out to the testator and he thereupon executes it, all further enquiry is shut out (f).

12. *Purdanashin lady* When dealing with a case of a deed or will executed by a *purdanashin* lady, a particular and peculiar onus rests upon those who come forward to support the document to shew that the executant thereby understood what she was doing, and was thoroughly and fully acquainted with the terms of the document she was executing (g), as the court throws special protection round *purdanashin* ladies (h).

13. *Costs* Where the facts surrounding the making of a will bring the case within the principles laid down in *Foulton v Andrew* (i) or *Tyrrell v Panton* (j), and impose upon the propounder the burden of removing the suspicion attached to the making of the will, the person opposing it, though unsuccessful, ought to have his costs, as between party and party, allowed out of the estate (k).

14. *Inconsistent defences* As to whether inconsistent defences can be taken, e.g., an allegation of forgery of signature and of execution under undue influence, it has been laid down in *Mahomed Bulsh v Hosseini* (l) that such defences cannot be taken but held to be permissible in *Alikhan v Rambaran* (m).

15. *Pleadings* It is a well settled rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged another kind of fraud cannot upon a failure of proof, be substituted for it (n). Where evidence was given tending to show that the testatrix was prevented by force and threats

- (a) *Lachho v Gopi* 23 A, 472 referring to *Barry v Bullin*, 2 Moo P. C. 460 482, *Foulton v Andrew* L R 7 H L 448, *Tyrrell v Panton* 1894 P D, 151, *Fatrelly v Corrigan* 1899 A C 563, *Steeman v Gopaul* 11 M I A 28, 44, 20 E R 11, *Motibai v Jamssetjee*, 26 Bom L R 579, 80 I C 777, *King v Abreu*, 5 L Bur R 141, 40 I C 1034, *Rashmohini v Umesh*, 25 C 824, *Sukh Dei v Kedar*, 23 A 405, 5 C W N 895 P C.
- (b) *Lachho Bibi v Gopi Narain* 23 A 472 see also *Mitchell v Jones* 6 Moo P C 137. As has been said in *Motibai v Jamssetjee* 29 C W N 45 80 I C 777 P C, the onus of establishing capacity lies on the petitioner for probate but if the will be impugned by a caveator on the ground

- of undue influence etc, it lies upon the caveator to establish that case.
- (c) *Finn v Govett* 25 T L R 186
- (d) *Janjeshwar v Ugreshwar* 11 C W N 824
- (e) *Boyse v Rosburgh* 6 H L C 2 49
- (f) *Foulton v Andrew*, L R 7 H L 448
- (g) *Khas Mehal v Adm Genl* 5 C W N 505
- (h) See *Bindubasini v Girdhari* 12 C L J 115 (case of deed), *Alikhan v Rambaran* 12 C L J 357 *Nitarini v Nando* 30 C 369, 7 C W N 353
- (i) L R 7 H L 448
- (j) 1894 P 151
- (k) *Wilson v Bassil* 1903 P 239, *Orton v Smith* 3 P & D 23 fold
- (l) 15 I A 81, 15 C 684
- (m) 12 C L J 357 (not cases of wills)
- (n) *Abdul v Turner* 11 B 620 643

signature may be disregarded (a) Where a testator signed the sheets in order to guard against others being interpolated, the signatures were held to be insufficient (b) A signature in the attestation clause of a printed form of a will has been held sufficient (c)

13 Cl (c). Shall be attested To attest means being present and seeing what passes An attesting witness is one who sees a deed executed and who signs it is a witness (d) The attestation required by S 59 of the Transfer of Property Act of 1882 was attestation by witnesses of the execution of the document and not on admission of execution (e), but the law has now been changed The witnesses must sign *animo attestandi* (with the intention to attest) (f) Therefore, merely writing on the will the words 'witness' (g) or 'this is' (h) (testator's signature) is not sufficient In the absence of anything to show that intention it is essential that the attesting witnesses should be described as such : e, as persons who were present and witnessed the execution A person who was described as a writer of a deed and who was present and witnessed the execution and whose name appeared on the document, was a competent witness to prove execution (i) In case of a registered will the endorsement at the back, purporting to show that the will having been acknowledged by the testatrix and its execution admitted the Registrar and another witness (usually the identifier) signed the endorsement, is regarded as sufficient attestation under cl (c) (j) The witnesses need not attest in the presence of each other (k)

14. Attestation clause No express attestation clause is necessary (l) Therefore, no particular form of words need be used for the purpose of attestation Where there are no suspicious circumstances due execution will be presumed even in the absence of an attestation clause (m) So where the testator and the attesting witnesses were dead and there was no attestation clause, the will was admitted to probate (n) But if the will be lost due execution must be proved (o) 'An attestation clause forms no part of a will or codicil even when written by the testator, and, therefore, a recital by mistake in an attestation clause to a codicil that a former codicil was cancelled does not revoke that codicil' (p)

15. Proof of attestation Strict affirmative proof of due attestation is not absolutely necessary where the circumstances are such as to warrant the court in reasonably concluding from those circumstances that the will had been

- (a) *Dunn v Dunn*, 1 P & D 277. J 98
 (b) *Re Dilkes* 3 P & D 164, *Phipps v Hole* 3 P & D 166
 (c) *Re Porthouse* 24 C 784
 (d) *Dalichard v Lotu* 44 B 405
 (e) *Abdul v Salim* 27 C. 190
 (f) *Sablin v Saci*, 19 C. W. N. 1297, 291 C 743
 (g) *Re Eynon*, 3 P. & D 92
 (h) *Re Wynne*, 13 B L. R. 392
 (i) *Raj Narain v Abdul Rahim* 5 C W N 454
 (j) *Horendra v Chandrakanta* 16 C. 19, *Huro Sundari v Chunder*, 6 C 17, *Nitye v Nagendra* 11 C 429 fold, *Amarendra v Kashinath* 27 C. 169.

- Mir Syed v Talyaba* 26 1 C 547.
Sarada v Triguna 1 Pat 300
Mohammad v Ali Hyd-r, 85 1 C. 509 But see *Umakanla v Bhismabhar*, 8 Pat 419, 117 1 C 874
 (k) *Ghanshamdoss v Saraswati* 87 1 C. 621
 (l) *Bryan v White* 14 Jur 919
 (m) *Wright v Sanderson* 9 P D 149, *Wyatt v Berry* 1893 P 5 *Re Moore* 1901, P 44, *Pillington v Grav* 1899 A C. 401
 (n) *Re Percerell*, 1902 P 205
 (o) *Ekkenley v Platt* 1 P & D 281. *Eyre v Lyre* 1903 P 131
 (p) *W 52*, *Bryan v White* 2 Rob 315. *Re Atkinson*, 8 P D 165

duly attested. The presence of these circumstances give rise to the presumption that the will was duly executed and attested (a). The presumption will arise even in the absence of an attestation clause (b). In this country the presumption arises under this section (c), *e.g.*, where a testator asks a witness to attest his will (d). But the presumption does not arise where there is evidence impeaching the validity of the will (e). "A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to the last part may apply to the whole, including as well what was long before written as what has recently been added" (f).

16. Attestation where will consists of several sheets. When a will consists of several sheets, the detached parts must be present when the attestation takes place and it must be intended to apply to the whole (g). Where a will and a codicil were separately fastened and the codicil was signed by the testator, "an attestation clause on the back of the will was held not applicable to the codicil without proof that it was so intended and that the sheets were pinned together at the time of subscription" (h). As to the nature of attachment necessary see *re Gausden* (i). Where each sheet was duly signed by the testator and all but the last was also subscribed by the witnesses, *held*, the witnesses not having attested the last signature, the will was not properly executed (j). Where a will consisted of several sheets each of which was signed by the testator and after the testator's signature on the first page four witnesses had signed and after the testator's signatures on the other pages two of them had signed, *held*, the testator's signature on the first page was the operative signature and the witnesses signing *animo attestandi*, the will was properly executed (k).

17. Order of signature. The section does not prescribe in so many words the order in which the signature of the testator and of the attesting witnesses are to be affixed. But it has been said that it is implied from the language used and from the order in which the rules for execution are laid down that the Legislature intended that the two attesting witnesses must have seen the testator sign before they affixed their own signatures, in other words, they must sign their names after the testator had signed, or made an acknowledgment to them of his signature (l). "The Court will in some cases presume that the testator had signed his name prior to the attestation, although there is no direct proof of the fact" (m). Probate has been granted where attesting witnesses were

(a) *Nitai v. Nagani*, 10 C. L. J. 499; *Wright v. Sanderson*, 9 P. D. 149.

(b) *Burgoyne v. Showler*, 1 Rob. Ecc. 5; 163 E. R. 945.

(c) *Subasundari v. Hemangini*, 4 C. W. N. 204.

(d) *Ghanshamdoss v. Saraswati*, 87 I. C. 621.

(e) *Re Lee*, 4 Jur. N. S. 790; *Wyatt v. Berry*, 1893 P. 5; but see *Wright v. Sanderson*, 9 P. D. 149.

(f) *Re Catrall*, 33 L. J. P. 106; J. 105, 7 Ed.

(g) *Bond v. Seawell*, 3 Burr. 1775.

(h) *Re Braddock*, 1 P. D. 433.

(i) 31 L. J. P. 53.

(j) *Sweetland v. Sweetland*, 34 L. J. P. 42; *Re Dilkes*, 3 P. & D. 164; *Phipps v. Hale*, 3 P. & D. 166.

(k) *Sabitai v. Saol*, 19 C. W. N. 1297; 29 I. C. 743.

(l) *Bissonath v. Doyaram* 5 C. 738; *Huro Sundari v. Chunder*, 6 C. 17; *Auktanath v. Jitendra*, 22 C. L. J. 262; 19 C. W. N. 1295. *Khullun v. Poona*, 24 W. R. 322; *Hindmarsh v. Charlton*, 8 H. L. C. 160; 1 Sw. & Tr. 433; *Wright v. Sanderson*, 9 P. D. 149; *Wyatt v. Berry*, 1893 P. 5; *Brown v. Skirrow*, 1902 P. 3, 7.

(m) W. 44. I. n. *Re Huckleale*, 1 P. & D. 375; *Re Peam*, 1 P. D. 70.

both dead and the order of the signatures could not be ascertained (a) A person signing at the end of a document but above the executants signature cannot be an attesting witness. *Querry*, whether a scribe signing a document can supply the place of an attesting witness in face of S 68 of the Evidence Act (b)

18. Each of whom has seen This section requires that each of the witnesses should sign in the presence of the testator or that they should occupy such a position that the testator could be said to be in the presence of each of the witnesses while he is signing the will (c) Where witnesses see the testator's signature on a will but not its contents and are asked by him to sign it the attestation has been held to be good (d). It is not necessary that the witnesses should see the fingers of the testator move while the signature is made (e) It is sufficient that the witnesses had a clear view of the testator (f) It is not necessary that affirmative evidence should be forthcoming that the testator did as a matter of fact see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively (g) Where of two attesting witnesses one could see and be seen by the testator, but the other being behind the curtain neither could see nor be seen by the testator, held both were in the presence of the testator to make their attestation valid (h) Where after the testatrix had signed, while one of the attesting witnesses was signing her Christian names the other attesting witness came up and to her the testatrix made an acknowledgment of her signature held as the first witness did not complete her signature, the attestation was good (i) An attestation was held good where a testatrix sat in her carriage opposite to the window of an attorney's office where the will was attested (j) Where a testator does not sign in the presence of witnesses they must have an opportunity of seeing the signature of the testator and if such be not the case it is immaterial whether the signature be, in fact at the time of attestation, or whether the testator say that the paper to be attested is his will, or that the signature is inside the paper (k) Therefore not only must there be an acknowledgment that the instrument is the will but there must be an acknowledgment of the signature as well and also an opportunity for the witnesses to see the signature (l) The acknowledgment may be of a signature made by the testator himself or by somebody else for him (m) The acknowledgment may be by gestures (n) The section however requires a personal acknowledgment to be received from the testator himself It is not

- (a) *Re Puddephall* 2 P & D 97, *Re Peverell*, 1902 P 205
 (b) *Bahadur v Balchand* 11 C. 179
 (c) *Mirza v Sangster* 3 Luck 482 112 I C 13, *Horendra v Jitendra* 16 C 19, *Sher Muhammad v Dy Commissioner* 58 I C 134, *Uma Kant v Bismambhar* 8 Pat 419, 117 I C. 874
 (d) *Re Isaac Moore*, 1901 P 44
 (e) *Kelki v Dy Commissioner* 58 I C 945; 7 O L J 589
 (f) *Kelki v Dy Commissioner* 58 I C. 945.

- (g) *Brahmadal v Chaudan* 20 C. W N 192
 (h) *Newton v Clarke* 2 Curt 320, but see *Carter v Seaton* 6 C. W N 117
 (i) *Fallock v Harris* 10 C W N 117
 (j) *Fallock v Harris* 10 C W N 117
 (k) *Fallock v Harris* 10 C W N 117
 (l) *See Re Gunstan* 7 P D 102
 (m) *Re Regan* 1 Curt 908
 (n) *Re Davies*, 2 Rob 337

necessary that both the witnesses should prove the same state of things, but it is enough if one saw the testator sign the will and the will was acknowledged before the other (a) Where a testatrix signed a will in the presence of a witness, when the other witnesses entered the room and the former was asked by a third person to sign his name under the testatrix's signature which he did, and then the second witness also signed held the will was properly attested, the words of the third person requesting witnesses to subscribe were heard by the testatrix and were as it were her own words (b) In case of a blind testator the rule is that if he is so placed that had he not been blind he could have seen the witnesses then these witnesses were in his presence within the meaning of law (c)

19 Acknowledgment of the testator's signature An eminent authority has laid down the following rules with regard to acknowledgment (d)

(1) The signature to be acknowledged may be made by the testator or by another for him (e)

(2) A testator whether speechless or not may acknowledge his signature by gestures (f)

(3) There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature (g) not even though the testator should expressly declare that the paper to be attested by them is his will (h)

(4) When the witnesses either saw or might have seen the signature an express acknowledgment of the signature itself is not necessary a mere statement that the paper is his will (i) or a direction to them to put their names under his (j), or even a request by the testator to sign the paper (k) is sufficient (l)

(5) When the signature is seen or expressly acknowledged it is not material that the witnesses are not told that the instrument is a will (m)

(6) It is of course sufficient on a mere re execution merely to acknowledge the signature made on a former occasion (n)

20 The witnesses shall sign Witnesses may sign at any place in the will provided they mean thereby to attest the signature of the testator (o) A will

(a) *Muklanath v Jendra* 22 C L J 262, 19 C W N 1295 *Re Roymoney* 1 C 150

(b) *Inglesant v Inglesant* 3 P & D 172

(c) *Re Piercey* 1 Rob 278 *Newton v Clarke* 2 Curt 320 cited in *Horendra v Chandrakanta* 16 C 19

(d) J 101 7 Ed

(e) *Re Regan* 1 Curt. 908 see *Burke v*

More 1 R. 9 Eq 609

(f) *Re Davies* 2 Rob 337

(g) *Re Harrison* 2 Curt 863, *Re*

Swinford, 1 P & D 630

(h) *Re Gunstan Blake v Blake* 7 P D 102, *Beckett v Howe* 2 P & D 1 contra overruled Acknowledgment by the testator of his signature before witnesses is enough even though they do not see him sign or observe the testator's signature, *Balmukund v Bhagwandas* 15 Bom L R. 209, 19 1 C 401

404, *Gwillim v Gwillim* 29 L J P 31, *Smith v Smith* 1 P & D 143, 35 L J P 65, *Beckett v Howe* 2 P & D 1, 35 L J P 1 held to, provided the testator's signature was there *Ameerchand v Mohanad* 6 C L J 453, *Manicklal v Hormasji* 1 B 547

(i) *Re Davies* 3 Curt. 745 *Gwillim v Gwillim* 29 L J P 31, *Re Huckvale* 1 P & D 375

(j) *Gaze v Gaze* 3 Curt. 451

(k) *Wright v Sanderson* 9 P D 149.

Daintree v Butcher 13 P D 102

(l) *Re Pattison* (1918) 21 R. 90

(m) *Kelgwin v Kelgwin* 3 Curt. 607. *Re Moore* 1901 P 44

(n) *Re Dewell* 17 Jur 1130

(o) *Re Davis* 3 Curt 745, *Roberts v Pfitzer*, 4 E & B 450 held in *Re Streetley* 1591 P 172

written in duplicate is not properly attested if one be signed by the testator and the other by the attesting witnesses (a) Witnesses must sign with the intention to attest the testator's signature and the position of their signatures may be material from this point of view Thus a legatee may show from the position of the signatures that the signatories did not sign as witnesses (b) The position of the signatures may create a presumption which is rebuttable that they have been attached by the witnesses as attesting witnesses (c) On re-execution of a will a witness must sign over again In England a signature by a witness includes a mark initials full name or description as in the case of a testator (d) But writing the word Bristol (e) or putting the date of re-execution (f), or signing the name of the husband of the witness (g) will not do Acknowledgment by a witness is not sufficient compliance with the Act (h)

21 **Contradictory testimony of attesting witnesses** Where attesting witnesses contradict each other as regards attestation the court may take the evidence of other witnesses present on the occasion into consideration (i) or relying on the probabilities of the case may admit the will to probate (j) so also where both the attesting witnesses state that the attestation was not proper (k) unless the witnesses conclusively prove what they state (l) The mere fact the attesting witnesses have repudiated their signatures does not invalidate a will Every presumption will be made in favour of due execution and attestation of a will regular on the face of it and apparently duly executed (m)

22 **In the presence of** Presence involves two factors namely mental cognition of the act and physical contiguity the person in whose presence an act is done must be able to know what is being done and what is done in the presence of a person must take place in physical proximity to him (n) The expression implies a testator being in such a position that he could if he chose see the witnesses Thus where the testatrix a *purdanashin* lady sat behind a closed fold of a door and she could have seen the witnesses by putting her head forward held the attestation was good It is not absolutely necessary that a testator should actually see the witnesses who attest the will for a blind man can make a will (o) Mere contiguity however is not enough where the testator's view is obstructed (p) No doubt the rule is if the testator might see he did see but if the testator in the actual position in which he was (q) or

- (a) *Re Hallon* 6 P D 204
 (b) *Dunn v Dunn* 1 P & D 277 *Re Smith* 15 P D 2
 (c) *Shiam Sunder v Jagannath* 54 M L J 110 106 1 C 534
 (d) J 103 4 7 Ed
 (e) *Re Trevanion* 2 Rob 311
 (f) *Hindmarsh v Chailton* 8 H L C 160
 (g) *Re Leceyington* 11 P D 80
 (h) *Dunn v Dunn* 1 P & D 277 *Re Smith* 15 P D 2
 (i) *Young v Richards* 2 Cut 371
 (j) *Wright v Rogers* 1 P & D 678
 (k) *Cooper v Bockett* 3 Cut 648 663
 664 *revid* on app 4 Moo P C 419

- (l) *Re Gunstan* 7 P D 102 W 76 78 11 Ed
 (m) *Brahmadat v Chaudan* 20 C W N 192 34 1 C 686 (see notes c ed) see *Balmukund v Bhagwandas* 19 1 C 401 404
 (n) *Saur v Baroda* 14 C W N 974
Hamongal v Ganaur 13 C W N 40
Lari v Rai Ganga 14 C W N 165 *revid* to
 (o) *Hotenda v Chandra Kanta* 16 C 19
 (p) *Re Colman* 3 Cut 118 *Carler v Sealton* 85 1 T 76
 (q) *Jenner v Ffynch* 5 P D 106
Brown v Skirrow 1902 P 3

because of his inability to move without help (a), could not see the witnesses sign the attestation will be insufficient. It is further necessary, as observed by Mr Jarman (b) that the testator should be sensible of the act performed before him. Therefore if the witnesses sign while the testator is in an insensible state the attestation is bad (c). The testator must further be conscious of the act therefore attestation without the testator's knowledge is insufficient (d). The witnesses must sign in the presence of the testator though not necessarily in the presence of each other (e). The Wills Act of England requires the simultaneous presence of two witnesses (f). Previous to that Act under the Statute of Frauds it was not necessary for the witnesses to sign in presence of each other they could therefore attest the execution separately at different times (g). The Indian Act has adopted the old rule. This section does not require both the witnesses to be present at the same time (h) therefore a will signed before one witness and its execution acknowledged before another and attested by both witnesses is properly executed (i).

23. **Presumption in favour of a will.** A will cannot be impeached on account of the inferior social position of the witnesses. Something more than mere suspicion is necessary in such a case (j). It is not safe or desirable to rely on suspicious circumstances in face of clear evidence of a trustworthy attesting witness. A will apparently in perfect form is not to be discredited simply because in the opinion of the court the disposition of property ought to have been different (k). Where a will is in every respect a natural will and in accordance with the feelings and tenor of life of the testator the presumption of law is in favour of its being maintained if its execution is proved by anything like reasonable evidence (l). All things are presumed to have been rightly done in case of a will regular on the face of it unless there is reasonable ground shown for doubting it therefore where witnesses did not remember having attested a will but acknowledged their signatures the attestation was held good (m). Recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Attestation of a deed proves no more than the signature of an executing party has been attached to a document in the presence of a witness. It does not imply any knowledge of the witness of the contents of the deed (n). With regard to secret trusts extrinsic evidence to show a specific trust is inadmissible unless the legatee under the will assented to the trust or led the testator to believe that he has assented to it (o).

- (a) *Trice v Trice* 1 Rob 775
 (b) *Wills* p 107 7 Ed
 (c) *Right v Price* Doug 241
 (d) *Jennerv Ffynch* 5 P D 106
 (e) *Re Webb* 1 Deane & Sw 1
 (f) *Hindmarsh v Charlton* 8 H L C 160
Wyatt v Berry 1893 P 5
Brown v Skirrow 1902 P 3
 (g) *Ellis v Smith* 1 Ves Jun 12
 (h) *Sabril v Savi* 19 C W N 1297
 29 L C 743
 (i) *Saroda v Triguna* 1 Pat 300 70 L C 402
 (j) *Dulhin v Hamnandan* 20 C W N 617
 P C 33 L C 790
Cholay Narain v Rafan 22 L A 12 24

- Jagran v Durga* 41 L A 76 80
 (k) *Arunachellam v Ramaswami* 20 C W N 673 30 M L J 555 P C
 (l) *Jagran v Durga* 36 A 93 22 L C 103 P C
 (m) *Woodhouse v Baljour* 13 P D 2
Brahmadat v Chaudan 20 C W N 192
Wright v Sanderson 9 P D 170

- Woolmer v Daly* 1 Loh 143
 (n) *Banga v Jagat* 44 C 186
 (o) *Taylor v Krishna* 2 L C 4

64. (S. 51) If a testator, in a will or codicil duly

Incorporation of attested, refers to any other document then papers by reference. actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

1. Change. The words "deemed to form" have been substituted for "considered as forming"

2. The section. It applies to the wills of Hindus, etc. The execution of an unprivileged will, to be valid, requires compliance with certain formalities. But a will may by reference incorporate a document which is not properly executed as a will or a codicil. Thus, where a testator made a will which was deposited in India and then executed a codicil in England referring to and confirming a paper purporting to be a copy of the will but which was not duly executed as a will, *held*, being incorporated in the codicil probate could be granted of the paper (a). By incorporation any informally executed document (not necessarily one intended to have a testamentary operation) referred to by the testator in order to explain his intention will be deemed to form part of the will or codicil (b). The effect of such incorporation is that the document though invalid as an independent instrument (c) yet takes effect as a testamentary disposition, the defect of the instrument being cured by incorporation (d). Thus, a codicil conditioned to take effect upon an event which did not happen was held to have the effect of setting up an unattested will to which it referred (e). The rule as regards incorporation is subject to two conditions (1) The document must be existing when the will was made, and (2) it must be referred to in terms which point out with sufficient distinctness to an existing document, so that the court may be able to say without any doubt that it is the instrument referred to (f), or, as has been more shortly put, it must be clearly identified by the description given of it in the will (g), with the help of parol evidence, if necessary (h). Both these matters must be established, one without the other is not sufficient.

3. Document must be in existence. This is clearly indicated by the words "any other document then actually written," which imply that the document must be in existence at the time of reference by the will or codicil (i). A reference to a deed "dated, etc. and made between, etc." is a reference to an existing instrument (j). Where a will of an Oudh Talukdar was not registered as required by the Oudh Estates Act (I of 1869) and an addendum was made to it which was duly executed as a will and registered *held*, by incorporation

- (a) *Re Mercer*, 2 P. & D 91, see *Allen v Maddock*, 11 Moo P. C. 427, *fold* in *Re Heathcote*, 6 P. D. 30.
- (b) J. 123 7 Ed
- (c) *Moosabhai v Jacobbhai* 29 B 267; 7 Bom L. R 45 (case of deed)
- (d) *Bizzey v Flight*, 3 Ch D 269
- (e) *Re Da Silca*, 30 L. J P. 71.
- (f) *University College, etc v. Taylor*, 1907

- P 228
- (g) *Singleton v Tomlinson*, 3 A C 404
- (h) *Allen v Maddock*, 11 Moo P. C. 427.
- (i) *Re Sunderland*, 1 P. & D 193, *Durham v Northern*, 1895 P. 66; *Re Smart* 1902 P 238
- (j) *Sheldon v Sheldon*, 8 Jur 877; *Bizzey v. Flight*, 3 Ch. D, 269.

the original will became valid (a). "So a reference to persons or things "herein-after named" (b) or to "the annexed schedule" (c), is not so clear a reference to any document as then existing as to incorporate writings that follow the signature of the testator and of the witnesses" (d).

If the document comes into existence after the date of the will it cannot be incorporated in the will (e). Where "a testator by his will directs part of his property to be disposed of in such a way as he shall by letter, memorandum, etc., or the like, direct, it is clear that no such document can have any testamentary operation, unless executed as a will, or incorporated by a subsequent will or codicil" (f). But courts have given testamentary operation to unattested documents in case of secret trusts (g). A document not in existence at the time of the will may however be incorporated by a reference in a codicil if it exists at the date of the codicil, provided the will speaking from the date of the codicil refers to the document as then existing (h). Thus a codicil confirming a will which latter directs certain properties to be distributed in the manner directed in a memorandum by the testator will not have the effect of incorporating the memorandum (i).

4. The document must be capable of being clearly identified. Where a testator made a will and several codicils, and in 1838 made a codicil which was signed but not attested, and by a further codicil in 1839, duly signed and attested, declared that he thereby "ratified and confirmed his said Will and Codicils," held, such general reference was not sufficient to identify and so incorporate the codicil of 1838, the reasons being that a codicil strictly speaking means a codicil duly executed, and secondly, the general description without particular mention of the codicil in question introduces an element of uncertainty (j). Probate of unattested papers has been refused in several cases (k) for want of sufficient evidence to identify them (l). Of course there must be reference in a will or codicil to the document sought to be incorporated. Therefore, where a deed poll was not referred to in the will for the purpose of making it part of the will, held, it was not a testamentary writing under this section (m).

5. Admission of parol evidence. Parol evidence must necessarily be received to prove whether there is or is not in existence at the testator's death any such instrument as is referred to by the will or codicil. A reference in a will or codicil may be in such terms as to exclude parol testimony, as where

- (a) *Satrups v. Hulas* 25 A 121 P. C
 (b) *Re Walkins*, 1 P. & D. 19, *Re Brewin*, 33 L. J P. 124
 (c) *Singleton v. Tomlinson*, 3 A C 404 413 414.
 (d) J 124 7 Ed.
 (e) *Re Weymiss* 4 C. 721; See *Re Marchant*, 1893 P. 254; *Re Smart*, 1902 P. 238.
 (f) J 123 7 Ed *Re Lancaster*, 29 L J P. 155; *Johnson v. Ball* 5 D. G. & S 85; *Re Matthias* 3 S. W. & Tr 100 and other cases referred to
 (g) *Re Marchant* 1893 P 254; *Re Blackwell* 1928 Ch 614; aff'd in 1929 A. C. 318. J 123

- (h) *Re Stewart*, 32 L. J P. 94; *Re Truro*, 1 P. & D 221; *Durham v Northern* 1895 P. 66; *Re Smart*, 1902 P 238.
 (i) *Re Lancaster*, 29 L. J P 155; *Re Warner* 10 W R 566 T. 66 7 Ed.
 (j) *Croker v. Marquis of Hertford*, 4 Moo P C C. 339, 367
 (k) *Re Gill*, 2 P. & D 6; *Re Garnett*, 1894 P. 90; *Eyre v. Eyre*, 1903 P. 131; *University College &c v Taylor* 1907 P. 228; 1903 P. 140
 (l) J 126 7 Ed.
 (m) *Bal Gungabai v. Bhagwandas*, 32 L. A 142; 29 B. 530

it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but where there is reference in a duly executed testamentary instrument, so as to make the document referred to capable of identification, it is necessarily a subject of parol evidence. If the parol evidence satisfactorily prove that in the existing circumstances there is no doubt as to the instrument referred to, it is no answer that by any possibility circumstances might have existed in which the instrument could not have been identified. Thus a statement, "This is a codicil to my last Will and Testament," was held by reference to incorporate a will not attested and render it valid (a). In order to admit parol evidence, therefore, for the purpose of identifying a document referred to in a will and intended to be incorporated, the description of the document in the will must definitely refer to an existing document. If the will can be construed as referring to an existing or future document, parol evidence is not admissible (b).

6. **Onus.** The onus of proving the identity of the document and its existence at the date of the will lies upon the party seeking to establish it (c).

7. **Revocation of Incorporated document.** An incorporated document may be revoked by destruction (d).

8. **Two wills.** Where a testator makes two distinct wills, *eg.*, one of properties in England and one of those abroad, the former only need be proved in England (e). "But if one refers to and confirms the other in such a way as to incorporate it, both will be included in the probate" (f).

9. **Omission from probate.** An incorporated document may be omitted from probate where it is lengthy (g) or in the possession of a third party. Whether it is to be included in the probate or not "is a question of practical convenience" (h). Where an incorporated document is not set out in the probate copy, the original may be looked at by a civil court called upon to construe the will (i).

CHAPTER IV.

OF PRIVILEGED WILLS

65. (S. 52). Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called privileged wills.

(a) *Allen v Maddock*, 11 Moo P. C. 427, fold in *Re Heathcote*, 6 P. D. 30.

(b) *Unicentury College &c v Taylor*, 1908 P. 140, head note, 1907 P. 228. See *Re Garnett* 1894 P. 90. *Eyre v. Eyre*, 1903 P. 131.

(c) *Singleton v Tomlinson*, 3 A. C. 404.

(d) *Re Coyle*, 56 L. T. 510.

(e) *Re Ailor*, 1 P. D. 150, *Re Murray*,

1896 P. 65.
(f) *Re Harris* 2 P. & D. 83, *Re Howden*, 43 L. J. P. 26, *Re Todd*, 1926 P. 173.

(g) *Sheldon v Sheldon*, 8 Jur. 877.

(h) *Blizzev v Flight* 3 Ch. D. 269, 273.

(i) *Blizzev v Flight*, 3 Ch. D. 269; *Quilhampton v Goling*, 24 W. R. 917, J. 126-7, 7 Ed.

Illustrations

(i) A, a medical officer attached to a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.

(ii) A is at sea in a merchant ship of which he is the purser. He is a mariner, and, being at sea, can make a privileged will.

(iii) A, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.

(iv) A, a mariner of a ship, in the course of a voyage is temporarily on shore while she is lying in harbour. He is, for the purposes of this section, a mariner at sea, and can make a privileged will.

(v) A, an admiral, who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will.

(vi) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier and can make a privileged will.

1. **Change.** The words "or an airman so employed or engaged" have been added by Act X of 1927 and the words 'in the manner provided in section 66' have been substituted for the words 'as is mentioned in the 53rd section' by the Act of 1925.

2. **The section.** The section is not applicable to Hindus *etc.* The privilege consists in the exemption from the formalities laid down in S. 63. The nature and extent of the privileges are set out in S. 66. S. 11 of the Wills Act of 1837 (1 Vict. c. 26) deals with privileged wills and there are other Statutes also dealing with them (a). It should be noted that the privilege is confined to two classes of persons only, namely, a soldier and a mariner, and then only under the conditions laid down in the section. The rule is of ancient origin, being adopted from Roman law (b). The words 'mariner and soldier' are not confined to persons of the male sex alone (c).

3. **Soldier.** This word includes an officer and a surgeon in the army (d). It has been held to include a soldier in the employ of the East India Company (e).

4. **Employed, etc.** There must be a state of war to begin with and the soldier must be in some place for the purposes of that war or take some steps towards joining the forces in the field (f). Mobilisation order entitles a soldier to make a privileged will (g) as also receipt of order to proceed abroad in an

(a) "Wills Act 1837, s. 11" A. 7. 2. 2

(b) "Wills Act 1837, s. 11" A. 7. 2. 2

(c) "Wills Act 1837, s. 11" A. 7. 2. 2

(c) *Re Hale* (1915) 2 Ir. R. 362 (female typist on a liner), *Re Stanley* (1916) P. 192 (soldiers includes nurses)

(d) *Drummond v. Parish* 3 Curt. 522, *Re Hayes* 2 Curt. 33^a

(e) *Re Donaldson* 2 Curt. 326.

(f) *Re Huscock* 1901 P. 78, *Re Thome* 4 Sw. & Tr. 36

(g) *Guthard v. Kneer* 1902 P. 99

expedition (a). A soldier quartered in the barracks in time of peace is not entitled to make a privileged will (b).

5. **Mariner** The word includes a purser of a battleship (c), a surgeon in the navy (d), also a sailor in a merchantship (e).

6 **At sea** A ship in harbour or in a river has been held to be at sea (f). A mariner in the course of his voyage may make a privileged will while actually on shore (g). A mariner serving in a vessel stationed in Portsmouth harbour was held entitled to make a privileged will (h). The seaman must be at sea (i). A sailor who has received orders to join his ship can make a privileged will (j).

7. **The age of 18 years.** Under this section a soldier or mariner is competent to make a privileged will if he has completed the age of 18 years

8. **Alteration, revocation.** Alterations in a privileged will are presumed to have been made while the testator was entitled to make a privileged will (k). No formalities are required for the revocation of a privileged will (l). A privileged will is revoked by marriage of the maker (m).

66. (S.53.) (1) Privileged wills may be in writing, or may be made by word of mouth.

Mode of making,
and rules for
executing, privileged
wills.

(2) The execution of privileged wills shall be governed by the following rules:—

(a) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.

(b) It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

(c) If the instrument purporting to be a will is written wholly or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will.

(d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that

- (a) *Re Booth*, 1926 P 118
(b) *Drummond v Parish*, 3 Curt. 522
(c) *Re Hayes*, 2 Curt 338
(d) *Re Saunders*, 1 P & D 16
(e) *Morrell v Morrell*, 1 Hag Ecc 51.
The Merchant Shipping Act, 57 & 58
Vict. c. 60 also lays down certain
rules regarding disposition of property
by wills by merchant seamen
(f) *Re M' Curdo*, 1 P. & D 540.

- (g) *Re M' Murdo*, 1 P & D 540
(h) *Re M' Murdo*, 1 P. & D 540
(i) *Re Anderson*, 1916 P 49, *Barnard v Birch*, 1919, 21 R 404
(j) *Re Yates*, 1919 P 53; Wills
(Soldiers and Sailors) Act, 1918,
7 & 8 Geo V c 58
(k) *Re Tweedale*, 3 P & D 201
(l) *Re Gossage*, 1921 P 194 See S 72.
(m) *Re Wardrop*, 1917 P. 54

circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

(e) If the soldier airman or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will

(f) If the soldier airman or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

(g) The soldier airman or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

(h) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will.

1. Change Some verbal alterations have been made here and there. In clause (h) the words 'being still alive' have been added in this Act. The third clause of S 53 has been numbered (c) and (d) in this Act. The word 'airman' in clauses (e), (f) and (g) has been added by Act X of 1927.

2. The section. The section does not apply to wills of Hindus, etc. The various modes of making privileged wills are:—(1) written wholly by the testator, not signed (a) nor attested, (2) written by another person, wholly or in part, and signed by the testator; (3) written by another person, wholly or in part, by the testator's directions or recognised by him, not signed, nor attested; (4) if execution in the manner intended by the testator be not completed, it will be a valid will, if non-completion be not due to abandonment of testamentary intentions; (5) written instructions for preparation of a will, if soldier or mariner die before its execution, (6) verbal instructions for preparation of a will given in the presence of two witnesses and reduced into writing in the lifetime of the soldier or mariner (though not in his presence nor read over to him) when he dies before execution of the will, (7) a will by word of mouth (nuncupative will) declared before two witnesses present at the same time. The last mentioned kind of privileged will remains good for one month after the soldier or mariner has ceased to be entitled to make a privileged will, provided the testator is alive at that time. An entry in the kindred roll kept by military authorities

cannot be treated as a will (a) A privileged will is to be strictly proved by satisfactory evidence (b)

3 Duration of a privileged will In England a privileged will remains valid even after discharge of the soldier (c) unless there is intention to revoke (d)

4. Testamentary intention. In order to establish the validity of a soldier's will it has been held that it is not necessary to prove that he knew that he was making a will or that he had the power to make a will by word of mouth It is enough if he intend to express his wishes as to the disposition of his property in the event of his death (e) But in a later case it has been held that an informal will of a privileged person must be testamentary in character and intention f) Even a holograph instrument not intended to be testamentary has been held not to be a will (g) An intention to make a privileged will later on does not prevent an informal will of a privileged person from taking effect (h) If exception be taken to any part of a privileged will by military authorities it will be excluded from probate (i)

CHAPTER V

OF THE ATTESTATION REVOCATION, ALTERATION AND REVIVAL OF WILLS

67 (S. 54) A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband, but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Explanation—A legatee under a will does not lose his legacy by attesting a codicil which confirms the will

1 The section The section does not apply to wills of Hindus, etc It says that where the testator has made a gift to an attesting witness to a will, the attestation remains good but the gift becomes bad The Statute of Frauds required devises of lands to be attested by credible witnesses and witnesses to a will who were legatees under it were not regarded as credible Accordingly, their attestation was bad and wills in many cases became invalid In order to remove the inconvenience by the Wills Act Ss 14 and 15, it was provided that the attestation would not be affected by the gift but the gift should not take

(a) See *Bhagubai v Appaji* 47 B 552 72 I C 277

(b) *Morrell v Morrell* 1 Hag Ecc 51
Lemann v Bonsall 1 Add 389

(c) *Re Booth* 1926 P 118

(d) *Re Coleman* (1920) 2 L R 332

(e) *Re Stoble* 1919 P 7, fold in *Goodman v Goodman*, 1919 P 229

(f) *Re Beech* 1923 P 46

(g) *Boughton Knight v Wilson* 32 T L R 146.

(h) *Gallward v Kneec* 1920 P 99

(i) *Re Heywood* 1916 P 47 (only the testamentary part will be admitted to probate)

the testator's intention that the gift should be made to the child of the testator's wife, and that the gift should be made to the child of the testator's wife.

The testator's intention that the gift should be made to the child of the testator's wife, and that the gift should be made to the child of the testator's wife, is a condition of the gift. The testator's intention that the gift should be made to the child of the testator's wife, and that the gift should be made to the child of the testator's wife, is a condition of the gift.

The testator's intention that the gift should be made to the child of the testator's wife, and that the gift should be made to the child of the testator's wife, is a condition of the gift. The testator's intention that the gift should be made to the child of the testator's wife, and that the gift should be made to the child of the testator's wife, is a condition of the gift.

The testator's intention that the gift should be made to the child of the testator's wife, and that the gift should be made to the child of the testator's wife, is a condition of the gift. The testator's intention that the gift should be made to the child of the testator's wife, and that the gift should be made to the child of the testator's wife, is a condition of the gift.

4 Husband or wife. A spouse is an attesting witness will not be invalidated by a condition that the spouse will be a spouse (m).

5 Explanation for above

6 Effect of failure of gift. On failure of a gift under this rule to an attesting witness if the gift is followed by a gift over to the child of such witness there will be an acceleration and the child will get an immediate interest in the legacy if in existence at the testator's death (i). But if there be no child of the attesting witness, and if by the same will there be a further gift over in default of such child, then there will be no acceleration, but the heir

- (a) *Adm Genl v Lazar*, 4 M 244, 245
- (i) *Adm Genl v Lazar*, 4 M 244
- (d) *Ironfield v. Ironfield*, 30 L J Ch 177, 177
- (d) *Tempest v Tempest*, 2 K & J (643); see *Gaskin v Rogers*, 2 Eq 284
- (c) *Tempest v Tempest*, 2 K & J (643), *Re Marcus*, 56 L J Ch 830
- (f) *Gurney v Gurney*, 3 Drew 205; *Re Marcus*, 56 L J Ch 830
- (g) *Re Trotter*, (1879) 1 Ch 764; *Anderson v Anderson*, 13 Lq 381;
- (h) *Re Craven*, 99 L T. 390 J 82, 7 Ed

- (i) *Re Poles*, 40 Ch D 1; *Re Trotter*, (1879) 1 Ch 764
- (j) *Cresswell v Cresswell*, 6 Eq 69; *Adm Genl v Lazar*, 4 M 244
- (k) *Young v Daru*, 2 Dr & Sm 167.
- (l) *Sidgraves v Brewer*, 15 Ch D 594.
- (m) *Aslin v. Sone*, (1934) 1 Ch 543, *Re Clark* 31 Ch D 72; *Re Townsend's Estate*, 34 Ch D 357, J 83 7 Ld
- (n) *Thorp v Bestick* 6 Q B D 311
- (o) *Jull v. Jacobs* 3 Ch. D. 703, *Re Clark*, 31 Ch D 72, *Aplin v Stone*, (1904) 1 Ch 543.

will be entitled to the interim income during the life of the attesting witness and until birth of issue (a)

7. Privileged will The rule laid down in the section does not apply to a privileged will. An attesting witness is competent to take under such a will (b)

8. Effect of probate A civil court can regard a witness as an attesting witness if his name be included in the probate (c)

68. (S 55) No person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof

Witness not
disqualified by
interest or by being
executor

Change The words "shall be" have been substituted for the word "is"

The section The section applies to the wills of Hindus, etc. It says that a person who is appointed an executor of a will or has been given a benefit by a will, is not disqualified as a witness, solely by reason of such appointment or interest, from proving the execution of the will or its validity or invalidity. The section is based on Ss 16 & 17 of the Wills Act of 1837. 'The person who signs the testator's name at his request is not competent attesting witness (d), but the writer of the instrument is (e)

69. (S. 57.) Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

1. The section The section does not apply to the wills of Hindus etc. It follows closely S 18 of the Wills Act of 1837 which provides for revocation of wills by the subsequent marriage of the testator

2. The rule The rule is based on the principle that marriage brings about a wholly new set of obligations and the original will should not be allowed to stand. Whatever the reason may be the rule cannot be extended on the ground of presumption of intention or from change of circumstances e.g., birth of a

- (a) *Re Townsend's Estate* 34 Cl D 357
(b) *Re Limond* (1915) 2 Ch 240
(c) *Re Lancelley* 1859 W N 31.
Rantfield v Rantfield 30 L J Ch 179 n J 83. In *re Slarman* 1 P & D 661 the Court of Probate held that the residuary legatee did not sign as an

- attesting witness and directed her name to be removed from the grant. See *Re Smith* 15 P D 2
(d) *Acabal v Pestanj* 11 B H C R 87
(e) *Raj Narain v Abdur Rahim* 5 C W N 454 M 149

child (a) In fact § 19 of the English Wills Act expressly provides that a will shall not be revoked by any presumption of an intention on the ground of an alteration in the circumstances. No such provision is contained in this Act (b) Revocation takes place, therefore because it is provided by the law and not because of any presumption of such intention. The birth of a child has no effect on the will. The will of self-acquired property made by a Hindu has been held not to be revoked by the birth of a posthumous son of the testator (c). Even a declaration by the testator that the will shall not be null and void on marriage is of no effect. A will made in contemplation of marriage is revoked by the marriage taking place (d). But § 177 of the Law of Property Act (e) now provides that a will expressed to be made in contemplation of marriage shall not be revoked by the solemnisation of the marriage contemplated. No such change has been introduced in this Act.

3 Marriage The marriage contemplated by the section is a valid marriage recognised by the law (f). The marriage is not confined to the first marriage of the testator. Thus a will made subsequently to the first marriage and during the lifetime of the first wife was held revoked by a subsequent marriage of the testator (g). In case of mutual wills the marriage of one testator revokes his will but it does not affect the will of the other testator (h).

4 Domicil In English law it has been held that a will is revoked by marriage only where the testator has an English domicil. A will of a foreigner will be governed by the law of his domicil (i) but the capacity to marry is not affected by the law of foreign domicil (j).

5. Power of appointment A power of appointment is a power to dispose of the property of another so it has been described as 'a power to give away what you have not got'. It is therefore (so long as it remains as a power) not ownership but one of the rights into which ownership is divisible viz, the right of disposition separated from the other rights. It is therefore not an interest in the thing, but an authority to create an interest or interests. The interest or interests to be created under it will be, of course, future interests in the sense that it or they will arise sometime after the grant of the power or authority to create them. Powers of appointment can be validly created by wills of Hindu testators (k).

The ground of exception is obvious. The rule declaring a will to be revoked on marriage has been introduced in order to make provision for the wife and the children that might be born of the marriage in case the testator did not make a fresh will after marriage. Where in default of appointment property would not pass to the testator's heirs or representatives a will made in exercise of such a power is not revoked. The only kind of power of appointment therefore,

- (a) *Gramani v Danakott* 99 I C 775
 (b) *Subba Reddi v Dorasami* 30 M 369,
Gramani v Danakott 99 I C 775
 (c) *Subba Reddi v Dorasami*, 30 M
 369, *McCarson v Roe & Fox*, 8 Ad
 & El 14
 (d) *Re Cadymold* 1 Sw & Tr 34
Israell v Rodon 2 Moo P C 51
 (e) 1925, 15 Geo V. c 20 See S 57,

- note 11
 (f) *Mette v Mette* 1 Sw & Tr 416
 (g) *Gabriel v Mordakal* 1 C 148
 (h) " " " " " " " "
 (i) " " " " " " " "
 (j) " " " " " " " "
 (k) " " " " " " " "
 93, 21 B 705

that is revoked by marriage is where in default of appointment, the testator's heirs or representatives would benefit under the instrument creating the power. Thus, where in default of appointment the testatrix's brother would get the property, *held*, marriage subsequent to the will did not revoke the will (a), but it is only that part of the will, that exercises the power of appointment that is saved by the rule laid down in the section, the rest of the will is revoked (b). The words 'next of kin' alone (e.g. when used in a will) refers to a more limited class than the word 'next in kin' under the Statute of Distributions (c).

70. (S. 57) No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

Illustrations.

(i) A has made an unprivileged will. Afterwards, A makes another unprivileged will which purports to revoke the first. This is a revocation.

(ii) A has made an unprivileged will. Afterwards, A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

1. This section. The section applies to the wills of Hindus, etc. It is based on S 20 of the Wills Act of 1837. The provisions of this section are exhaustive as to the modes of revocation of wills. Even in cases of wills of Hindus, etc., the question of revocation is not to be decided with reference to what has been called Hindu sentiment and the spirit of the Hindu law but with reference to the provisions of the Hindu Wills Act. The will of a Hindu however, is not revoked by marriage (d). No will is revoked by a testator making gifts in his lifetime after the alleged date of the will (e).

2. Intention to revoke necessary. Revocation is a question of intention, except in the case of marriage when revocation takes place by operation of law. Thus, revocation during the insanity of the testator is ineffectual (f). It is now settled that a codicil will not impliedly be revoked, in the absence of an intention to that effect, by the revocation of the will (g). So also cancelling the wrong will by mistake or destruction of a will on the erroneous supposition that it is invalid (h), or has been revoked, or has become useless (i), or that another instrument is valid (j),

- (a) *Re Paul*, (1921) 2 Ch. 1
 (b) *Re Russell*, 15 P. D. 111
 (c) *Re Mc Vicar*, 1 P. & D. 671
 (d) See Schedule III cl. (4) and S. 57
 (e) *Thakar Singh v. Arya & Co.*, 110 I. C. 760
 (f) *Brunt v. Brunt* 3 P. & D. 37. *Re Hine*, 1893 P. 282.

- (g) *Surendra v. Shadas*, 35 C. L. J. 438
See Re Baker (1929) 1 Ch. 668.
Re Clements, 1892 P. 254
 (h) *Giles v. Warren*, 2 P. & D. 401.
Re Thornton, 14 P. D. 82.
 (i) *Clarkson v. Clarkson* 2 Sw. & Tr. 497. *Stamford v. Hile* 1902 P. 46
 (j) *Perrott v. Perrott*, 14 East. 423.
Dancer v. Crab 3 P. & D. 92

will not revoke the will (a) Intention to revoke must always be present In the absence of such intention there can be no revocation Thus, a mere mistake in copying the will shall not have the effect of revocation of the portion left out (b), a mere desire expressed by the testator to draw up a new will does not effect a revocation of the existing one (c), a will made under a mistaken notion of fact will not have the effect of revoking an earlier one (d) If there be a clause of revocation in a will it must express a present intention to revoke (e) A will partially torn, in the possession of the testator, will be deemed to have been torn by him (f) and will not amount to revocation if incomplete, particularly if desisted from further tearing by the interference of friends (g)

3 Implied revocation There may be implied revocation of a will Thus, where a will is missing, if it appear to the Court that the intention is "of such a part and of such a nature as to afford evidence that the deceased did not intend the document any longer to operate as a will," then it will be deemed to have been revoked (h) In case of a will in testator's possession not found after his death a presumption of revocation arises (i) The law is thus laid down by the Privy Council:—"It is well settled that a will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming unless it is proved by clear and satisfactory evidence that the later will contained words of revocation, or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier will, if it cannot be shown in what the difference consisted It is also settled that the burden of proof lies upon the person who challenges the will that is in existence" (j). Parol evidence may admitted in doubtful cases (k) The Court is to infer from the circumstances of the case with the help of extrinsic evidence whether the will has been revoked The intention to revoke will be gathered from a consideration of the substance and not of the form of the will (l)

Where there are two or more wills and they are inconsistent, they cannot stand together If they cannot be reconciled, and the later will in such a case, is considered to have revoked the former (m) It is however a well settled principle that the dispositions of the prior instrument will not be disturbed by a later

- (a) T 42 7 Ed
 (b) *Birks v Birks*, 34 L J P 90
Re Mackenzie, 1909 P 365 *James v Shrimpton*, 1 P D 431 (mistake of law)
 (c) *Thomas v Elan*, 2 East 488,
Panakkal v Elachar, 1917 M W N 645
 (d) *Crosthwaite v Dean* 5 Eq 245
 (e) *Cleobury v Beckett* 14 Beav 563,
see Toomer v Sobinska 1907 P 106
 (f) *Re Cowling* 1924 P 113
 (g) *Doe v Perkes* 5 B & Ald 459, *see Re Bra-sington* 1902 P 1, *Elms v Elms* 1 Sw & Tr 155, *Re Cowling* 1924 P 113
 (h) *Clarke v Scruffs*, 2 Rob 563 cited in *Re Woodward* 2 P & D 206, which again is cited in *Kedar v*

- Sarojini* 26 C 634, 3 C. W N 617
see Sahib Mirza v Umda Khanam, 191 A 83, 19 C 444
 (i) *Keen v Keen* 3 P & D 105, *Allan v Morrison*, 1900 A C 604, *Anwar v S S for India* 31 C 885
 (j) *Sahib Mirza v. Umda Khanam* 191 A 83, 19 C 444
 (k) *Jenner v Flynch* 5 P D 106
 (l) *Re Bryan*, 1907 P 125
 (m) *Re Bryan* 1907 P 125, *Cadell v Wilcocks* 1698 P. 21; *Kermode v Macdonald* 3 Ch 54, *Vencala naraiyana v Subbammal* 20 C. W. N 234; *Raikhori v Debendra*, 15 I A 37, 15 C 409 (the inconsistency was not such as to amount to revocation)

instrument further than is necessary (a) Where the inconsistency is not so great the court will give effect to both so far as they are not contradictory (b) Where a testator made two wills on the same date and it could not be ascertained which had been executed first, the two were rejected only to the extent to which they were inconsistent and therefore void for uncertainty (c) The court ought always try to reconcile them if possible (d)

A will made in exercise of a general power of appointment is revoked by a general clause in a later will revoking all prior wills (e) How far a will made in exercise of a special power of appointment is revoked by general words of revocation contained in a later will seems to be not yet fully settled (f)

4 Any part A testator is quite competent to revoke only a part of his will Where revocation is not express it is a question for construction by the court whether the whole will is revoked or only a part (g) Where there are more testamentary instruments than one if they are not inconsistent they will be together regarded as the will of the testator so far as they are not inconsistent (h) If however the later will deals with the entirety of the testator's property, the prior will is to be deemed to be revoked (i) Evidence of testator's intention is admissible in doubtful cases to show whether the later will was intended to be in substitution of the prior one (j) Extrinsic evidence including that of the testator's declarations is admissible for the purpose (k) A later will whose contents are not known does not revoke a prior will (l) There may be a partial revocation of a will by marriage e.g., where a part of the property is subject to a power of appointment (m) In cases of destruction of wills the question arises whether the testator intended to revoke the whole or a part of his will (n) Where the material portion of a will necessary to give validity to the document as a testamentary disposition is missing the whole will is deemed to be revoked (o) but not so always (p) The topic is fully discussed in *Kedar v Sarojini* (q)

5 By another will or codicil The law as regards revocation by a subsequent will or codicil is thus stated in *Townend v Moore* (r) citing from Williams the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one unless the latter expressly or in fact

- (a) *Duffeld v Duffeld* 3 Bl N S 260
Farrer v St Catharine's College 16 Eq 19
Re Howll-Shepherd (1894) 3 Ch 649
 (b) *Rai Kishori v Debendra* 15 I A 37 15 C 409
 (c) *Townsend v Moore* 1905 P 66
 (d) *Phelps v Gal of Angasco* 7 Bro P C 443
 (e) *Re Brough* 38 Ch D 456
Sotheran v Dering 20 Cl D 99
Kent v Kent 1932 P 108
 (f) See *Re Kingdon* 32 Ch D 634,
Kent v Kent 1932 P 108
 (g) *Re Woodward* 2 P & D 205
Leonard v Leonard 1932 P 243
 (h) *Lemage v Goodhan* 1 P & D 57
Re Hartley 50 L J P 1
Rai Kishori v Debendra 15 I A 37 15 C 409

- (i) *Kent v Kent* 1902 P 108
Re Bryan, 197 P 125
 (j) *Jenner v Ffynch* 5 P D 106
Chichester v Qualtrages 159 P 186
Towser v Moore 1905 P 66
 (k) *Treloar v Lean* 14 P D 49 see
Re Cowling 1924 P 113
 (l) *Dickson v Siddall* 11 C B N S 341 357
Heller v Heller 9 P D 237
 (m) *Re Russell* 15 P D 111
 (n) *Leonard v Leonard* 1932 P 243
 (o) *Treloar v Lean* 14 P D 49
Re Gullan 1 Sw & Tr 23
 (p) *Re Woodward* 2 P & D 205
Re Males, 12 P D 134
Re Leach 63 L T 111
 (q) 26 C 634
 (r) 1695 P 65

revoke the former, or the two be incapable of standing together, for though it be a maxim as Swinburne says, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, (so as they may be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary instrument be partially inconsistent with one of an earlier date, then such later instrument will revoke the former as to those parts only where they are inconsistent." In that case probate was granted of both the codicills so far as they were reconcilable. A codicil revoking a prior will does not necessarily revoke a prior codicil to that will (a). But by cutting off the signature to a will, a codicil on the same piece of paper was held revoked, there being proof of intention to revoke the codicil (b). Similarly, a codicil confirming a will in the absence of other circumstances confirms a codicil altering the will (c), but if the intention be to confirm the will alone without the alterations made by a subsequent codicil, the codicil will be held to be revoked (d). The doctrine that the words 'last will' in a testamentary paper necessarily imports a revocation of all previous instruments so far as it finds support from the case of *Plenty v. West* (e) is overruled by later cases (f). It is a question of intention when a codicil revokes a prior will whether the intermediate codicills are also revoked. Thus, if the revoking codicil refers to the will by date or distinguishes between the will and subsequent codicills the latter are not revoked (g).

6. *Some writing declaring an intention to revoke.* A writing to be effectual in revoking a will must be executed in the same manner as a will, i.e. signed by the testator and attested by two witnesses, although unlike a will it may contain no testamentary disposition. Thus, where a testator wrote at the foot of a will 'This will was cancelled this day,' and he duly executed such memorandum in the presence of two witnesses who also signed it, held 'this memorandum is merely a writing, and not will or codicil. The deceased does nothing by it in any way disposing of any property, he only revokes the paper to which it is attached' (h). A letter addressed by the testator to his brother and executed with the formalities required by this section as stated above was held effectual in revoking the will (i). In such a case, it has been observed 'the better course will be to order administration to issue with the memorandum annexed' (j). Where a testator obliterated the whole of a codicil so as to make it illegible, including his signature, by thick black marks, and at the foot wrote the words signed by himself and attested by two witnesses, "We are witnesses to the erasure of the above," held, though it did not come up quite to the letter of the Statute, the words constituted a writing declaring an intention to revoke

- (a) *Farrer v. St Catherine's College*, 16 Eq 19, *Re Savage*, 2 P & D 78, *Re Turner*, 2 P & D 403
 (b) *Re Bleckley*, 8 P D 169
 (c) *Green v. Tribe*, 9 Ch D 231, *Follett v. Pellman*, 23 Ch D 337.
 (d) *McLeod v. Mc Nab*, 1891 A C 471
 (e) 1 Rob 264
 (f) *Cutts v. Gilbert*, 9 Moo P C 131,

- Stoddart v. Grant*, 1 Macq 163 cited in *Townsend v. Moore*, 1905 P 66 but see J 1695 7 Ed
 (g) *Farrer v. St Catherine's College*, 16 Eq 19, *Pratt v. Pratt*, 14 Sim 129, T 48, 7 Ed
 (h) *Re Fraser*, 2 P & D 40
 (i) *Re Durance* 2 P & D 466
 (j) *Re Hicks* 1 P & D 683

another (a). Similarly a will cancelled in order to revive a prior will which cannot be revived, is not thereby revoked (b)

The doctrine applies where a legacy is revoked by the testator under an erroneous impression of fact, if the mistake appears on the face of the instrument. Thus, where a testator revoked certain legacies given by a codicil assigning as a reason that the legatees were dead *held*, there was no revocation the assumption of the facts being erroneous, the intention to change was dependent on the existence or non-existence of the fact of death (c). But where the revocation whether of a will or of a legacy is unequivocal, *ie* the intention to change is absolute and not dependent or contingent on the existence of certain state of facts, the revocation will accordingly be absolute (d)

It has been pointed out in the case of *Venkatanarayana v Subbammal* (e), that 'The Courts have recognised a distinction between cases where the infirmity of the second will was apparent on the face of the will, and the defect was intrinsic, (*eg*, for want of attestation) and cases where the will was inoperative for reasons outside the instrument, *ie* where the defect was extrinsic, (*eg*, for want of capacity of the donee to take). In the former case the second devise would not operate as a revocation of the earlier devise. In the second case it would'. In that case a testator governed by Mitakshara law disposed of by will his divided share in the ancestral property and gave his widow authority to adopt. But subsequent to the will he took a boy in adoption and the will thereupon became ineffectual. Then the testator made another will which, *inter alia*, gave the widow a contingent power to adopt but there were no words in the later will revoking the earlier one. The adopted son died after the testator, then the widow took a boy in adoption. It was held that the power to adopt given by the earlier will was not revoked by the later will although the dispositions of property could not take effect, as on adoption both the wills, to that extent, had become ineffectual.

11. Revocation by adoption Where a testator by will conferred on his wife a life estate with power to make a gift to an idol to be established by her and by a subsequent *anumatipatru* in which he referred to his will authorised his wife to adopt and provided that she was to have possession and management of the properties during her life and after her death her son was to be the *shebait*, *held*, on adoption the widow was divested and the adopted son took and that the *anumatipatru* in effect revoked the power of appointing a *shebait* conferred on the widow by will (f). A will however is not revoked by the birth of a posthumous son and it has been observed in another case, that by parity of reasoning the same argument will apply to the case of an adoption made by a widow after the testator's death (g). But where an adoption was made by the testator governed by the Mitakshara law after making a will disposing of ancestral property of which he was the sole surviving coparcener of a divided share the will was held to have been

(a) *Dixon v Solicitor to the Treasury* 1905 P. 42

(b) *Powell v Powell*, 1 P & D 209.
Re Weston, 1 P & D 633

(c) *Campbell v French*, 3 Ves 321

(d) *All Gent v Ward*, 3 Ves 327.
Quinn v Butler, 6 Eq 225. *Tupper*

v Tupper, 1 K & J 665 *reld*
to in *Venkatanarayana v Subbammal*,
43 I A 20, 39 M, 107

(e) 43 I A 20

(f) *Upendra v Hem* 25 C 405

(g) *Sukta Reddi v Dorasami*, 30 M, 369

revoked and of course after adoption a fresh will could not be validly made as a new coparcener was added by the adoption (a) Adoption, therefore operates as a revocation not under this section but because it takes away the capacity of the testator to dispose of his property, a ground which will not apply to an adoption by the testator's widow

12 Destruction of one part of a duplicate will. Such destruction generally gives rise to the presumption that the testator intended to revoke the will. The presumption arises when the part in testator's possession is destroyed (b), it is weaker when both parts are in testator's possession and only one is destroyed (c) Actual destruction or a formal revocation in writing is not necessary to constitute revocation of a Hindu will not governed by the Hindu Will's Act (d) The addition of cl (c) has no doubt altered the law.

71. (S 58.) No obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will.

Effect of obliteration, interlineation or alteration in unprivileged will

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

1. Change The words "has been executed" have been substituted for the words "shall be executed," the word "Provided" for the word "save," and the words "is made" for the words "be made".

2 The section. The section applies to the wills of Hindus, etc. It is based on S 21 of the Wills Act

3 Obliteration 'What is an obliteration? Is it not by some means covering over words originally written, so as to render them illegible? (c) Obliteration to be effective must be made in one of two ways, (i) It must be complete, so as to make the original words or their meaning illegible or unintelligible (f), or (ii) It must be duly executed in the manner required for the

(a) *Venkataranyana v Subbammal*, 43 I A 20, 39 M 107

(b) *Jones v Harding*, 58 L T 60, *Paige v Brooks*, 75 L T 455

(c) *Pemberton v Pemberton* 13 Ves. 290

(d) *Pertab Narain v Subhao Ameer* 4

I A. 228, 3 C. 626 fold in *Venkayamma v Venkataramanayamma*, 25 M. 678 P C.

(e) *Townley v Watson*, 3 Curt. 761, cited in *Re Harford*, 3 P. & D 211

(f) *Id.*

execution of a will (a) Complete obliteration of the signature has been held to revoke the will (b) Partial erasure of the testator's own signature does not amount to revocation (c) so also the name of a legatee has been supplied from the context where the erasure has been partial (d) The effacement of the original clause in a will by pasting paper over it has been held to be obliteration and it has been stated that if the words thus obliterated could not be read with the aid of glasses chemical agents should not be resorted to nor the pasted paper removed but probate should go with those parts in blank although if the amount of legacy was similarly effaced the upper paper may be removed (e) It is not allowable to resort to any physical interference with the document so as to render clearer what may have been written on it The words may be attempted to be read by placing a piece of brown paper round them and holding the document against the windowpane or with the aid of magnifying glasses (f) But in *re Gilbert* (g) a testatrix made several alterations in her will and later on pasted a piece of blank paper over them the court made an order for the removal of the paper only in order to ascertain what the words were Parol evidence is not admissible to prove the portion obliterated *e.g.* by producing a draft copy of the will (h) unless the doctrine of dependent relative revocation applies *i.e.* the erasure was effected to substitute another legacy in its place which latter was not effectual (i)

4 Interlineations or alterations There is a distinction between an interlineation and an alteration The former is used merely to complete an imperfect sentence while an alteration is a change in the original disposition (j) The section does not apply to the case of interlineations or alterations made before execution of the will Thus where a testator made several alterations in his will and confirmed it as altered by a codicil the court granted probate of the will showing the alterations and interlineations (k) Pencil alterations made before execution if the body of the will is in ink are generally disregarded being *prima facie* merely deliberative (l) But a clause inconsistent with the rest of the will if struck out in pencil will be treated as cancelled (m) In *re Greenwood* (n) the names of executors appeared below the attestation clause with an asterisk before *W* with another asterisk before the word executor in the body of the will and were written before the execution of the will It was treated as a sort of interlineation and the will admitted to probate but erasures and subsequent substitutions were not admitted So it is desirable for the testator and witnesses to initial the obliterations alterations and interlineations in order to prevent any question arising as to

- (a) *Re Horsford* 3 P & D 211 *Re Greenwood* 1892 P 7 *Re Mc Cabe* 3 P & D 94
 (b) *Thaddeus v Thaddeus* 6 P R 1899
 (c) *Re Godfrey* 69 L T 22
 (d) *Furniss v Phear* 36 W R 521
 (e) *Re Horsford* 3 P & D 211
 (f) *Efnch v Combe* 1894 P 191
 (g) 1893 P 183 see *Efnch v Combe* 1894 P 191
 (h) *Townley v Watson* 3 Curt. 761
Re Mc Cabe 3 P & D 94 In
Brooke v Kent 3 Moo P C. 334
 evidence dehors the will was admitted
 (i) *Re Horsford* 3 P & D 211 *Re*

- Greenwood* 1892 P 7
 (j) *Re Cadge* 1 P & D 543
 (k) *Re Boughton* 29 C 311 6 C. W
 N 477 *Iohann Gann v Gregory* 3
 D G M & G 777, *Re Hall* 2
 P & D 256 distgd where the
 alterations were deliberative and not
 confirmed by the codicil see also
Oldroyd v Haney 1907 P 236,
Tyler v Merchant 15 P D 216
 (l) *J 145 Gann v Gregory* 3 D M
 & G 777, *Re Adams* 2 P & D
 367
 (m) *Re Tonge* 66 L T 60
 (n) 1892 P 7

whether they were made before or after execution (a). In respect of alterations and interlineations made after the execution of a will, the rule is, that either the original words or their meanings should be rendered illegible or undiscernible, or they should be executed with the formalities necessary for the execution of a valid will. Thus, where a testator after execution of his will changed the word 'four' into 'five' but the alteration was not attested by witnesses, the court granted probate of the will with the word 'four,' it being plainly discernible (b). A case of unattested alteration in the name of the executor in a will has similarly been treated (c). Where a testator made certain alterations in his will in the presence of the Registrar which were not attested, letters of administration were issued with a copy of the will annexed without the alterations (d). No effect can be given to unattested alterations (e). Interlineations will be rendered valid by the initials of the testator and of the attesting witnesses being placed on the margin opposite the interlineations (f), or at the foot (g). The reason for requiring the security of attestation by two witnesses is to establish the fact that the testator has executed the whole instrument sought to be proved (h). An interlineation in a duly executed will, acknowledged but not signed by the testatrix and initialled by two witnesses, has been held not properly attested and therefore omitted from probate (i). Alterations made after the testator had signed but before attestation were allowed in a will not governed by the Hindu Wills Act (j). Where a testator having by his will duly executed, disposed of various properties, including a house struck out the words of description of the house and placed his own signature near such alteration and also interlined a clause in the last will and added a memorandum signed by him and attested by two witnesses to the effect that the words were struck out for the benefit of his wife, *held*, the memorandum validated the alterations, interlineations and obliterations (k). In *Ker v Meakin* (l), one of four pages of a will not attested by witnesses was substituted by the testator thereupon, probate of the whole will was refused. It was pointed out that the doctrine of dependent relative revocation would apply to such a case, provided the obliteration or alteration was made with a view to give effect to the substituted disposition altering the amount of the original legacy without revoking it altogether. In such a case on the failure of the altered disposition, because it was not effected in the manner required by law, the original gift would remain good (m). Reference in a codicil to an interlineation in a will after execution is validated by incorporation (n). Where the original words were not discernible, probate was issued with the parts erased in blank (o). The circumstance that there are blank spaces left in a will is no objection to its validity (p). An interlineation of a trifling nature has been allowed (q). 'The mere fact that

- (a) *Re Streatley*, 1891 P 172
 (b) *Re Beavan* 2 Curt 369, *Re Harris*, 1 Sw & Tr 536
 (c) *Re Greenwood*, 1892 P 7.
 (d) *Raghubar v Ram* 1 C.W.N 428
 (e) *Re Hay*, (1904) 1 Ch 317, *Re Adamson* 3 P & D 253
 (f) *Re Blewitt*, 5 P D 116
 (g) *Re Treeby* 3 P & D 242 (both in interlineation and obliteration)
 (h) *Re Adamson* 3 P & D 253
 (i) *Stockil v Punshon*, 6 P D 9

- (j) *Pandurang v Vinayak* 16 B 652
 (k) *Re Treeby*, 3 P & D. 242
 (l) 20 B 370
 (m) *Re Horsford* 3 P & D 211, *Re Mc Cabe* 3 P & D 94, *Re Greenwood*, 1892 P 7
 (n) *Re Heath* 1892 P 253, *Re Mills*, 11 Jur 1070
 (o) *Re James*, 1 Sw & Tr 238
 (p) *Pandurang v Vinayak*, 16 B 652.
 (q) *Re White*, 4 C 582, but see *Re Hindmarch* 1 P & D 307

the amount of a legacy or name of a legatee is inserted in different ink and in a different handwriting does not alone constitute an obliteration interlineation or other alternation within the meaning of the statute nor does any presumption arise against the Will having been duly executed as it appears (a)

5 Presumption A will is presumed to be duly executed even if there be no attestation clause (b) With regard to alterations and erasures the general presumption is that if unattested they were made after execution of the will but this presumption may be rebutted by proof of internal evidence to the contrary (c) Where there is a codicil the presumption is that alterations in a will were made not only after execution of the will but of the codicil also (d) unless the codicil confirms the alterations in the will (e) Evidence is admissible to show that the alterations were made before the execution of the codicil (f) A date to an alteration is not in itself sufficient to establish that the alteration was made at that time (g) Internal evidence may also go to prove the alterations to have been made prior to the execution of codicil (h) But it has been held that there is no presumption as to alteration before or after execution but the onus is cast upon the party seeking to benefit by the alteration to adduce some evidence from which the court might infer that the alteration was effected before execution of the will (i) Where the date of an alteration was uncertain the court on the evidence of an expert was satisfied that it was made before execution and admitted the will to probate (j) Parol evidence of declarations by the testator made before execution of the will has been admitted to rebut the presumption arising from alterations (k) Post testamentary declarations have been held not to be admissible on the ground that the effect would be to substitute a mere statement of the testator for attestation required by law (l)

6 Disposal of the subject matter of the legacy If a testator sell (m) provided the sale is not unauthorised (n) the legacy becomes inoperative A compulsory order for sale e.g. by order of court (o) or under an Act (p) operates as ademption of the legacy even where there is an order in such cases for re investment in some other land (q) But a direction to sell does not operate as ademption of the legacy but the legatee is entitled to it (r) It is

(a) *Greville v Tylee* 7 Moo P C 320
(b) *Re Hindmarch* 1 P & D 307
(affidavit of an expert in handwriting stating that the alterations were made at the same time as the will was sufficient)

(b) *Re Thomas* 28 L J P 33
(c) *Re Jessop* 1924 P 221 *Gann v Gregory* 3 D G M & G 777

(d) *Re Sykes* 3 P & D 26
(e) *Re Mills* 11 Jur 1170

(f) *Re Hall* 2 P & D 256 see *Re Hay* (1904) 1 Ch 317

(g) *Re Adamson* 3 P & D 253
(h) *Re Heath* 1692 P 253 see *Re Hay* (1904) 1 Ch 317

(i) *Williams v Ashton* 1 J & H 115
Greville v Tylee 7 Moo P C 320

(j) *Re Hindmarch* 1 P & D 307

(k) *Re Sykes* 3 P & D 26 *Doce*

v Palmer 20 L J Q B 367
(l) *Re Jessop* 1924 P 221 It is to be hoped that this decision will settle the law for cases are not wanting where statements both for and against a will made by a testator after its execution have been admitted in evidence See *Keen v Keen* 3 P & D 105 (cases cited in argument) The point was left open in *Woodward v Goulstone* 11 A C 469

(m) *Manton v Tabols* 30 Ch D 92
Re Clowes (1893) 1 Ch 214

Watts v Watts 17 Eq 217
(n) *Taylor v Taylor* 10 Hare 475

(o) *Steed v Preece* 18 Eq 192

(p) *Frewen v Frewen* 10 Ch 610

(q) *Beddington v Baumann* 1903 A C 13

(r) *Re Chiffertel* 73 L T 53

not proper to call these cases of revocation, for revocation, strictly speaking, can be effected only in the manner indicated in the section. Mr. Jarman has described them as "revocation by alteration of estate" (a).

72. (S. 59.) A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

The section. The modes of revocation of privileged wills enumerated in this section are three in number, (1) by an unprivileged will or codicil; (2) by an act expressing an intention to revoke if coupled with such formalities as will validate a privileged will (b), i.e., it can be unmade in the same manner in which it has been made if the testator express such an intention by any act (c); such revocation is possible though the testator at the time of revocation does not possess the capacity to make a privileged will (d); (3) by burning, tearing, &c. Besides, under S. 69 every will, and therefore necessarily a privileged will also, is revoked by the marriage of the maker (e).

The corresponding section in the Act of 1865 (S. 59) was, by the Hindu Wills Act, made applicable to the wills of Hindus, apparently by oversight, for the sections dealing with privileged wills were not applicable as they are not even now. This section is not included in Schedule III now and therefore does not apply to Hindus.

73. (S. 60.) (1) No unprivileged will or codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.

Revival of unprivileged will.

(a) J. 149 7 Ed., (Summarised from the author's book on wills).
(b) See S. 66.

(c) *Re Gossage*, 1921 P. 194.
(d) See *Explanation to the Sec.*
(e) *Re Wardrop*, 1917 P. 54.

(2) When any will or codicil, which has been partly revoked and afterwards wholly revoked is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil

1 Change The words shall be has been changed to has been' in three places in the section

2 The section This section applies to the wills of Hindus etc It is a reproduction of S 22 of the Wills Act 1837 (1 Vict c 26) with the addition of the words by the will or codicil at the end These words have been added in order to exclude any other mode of proving intention eg by parol evidence or other documentary evidence The court is to construe the testator's intention from what appears in the will or codicil itself The means of proof are clearly indicated by the words by the will or codicil Parol evidence is thus not admissible to show whether the testator's intention to revive a will extended to the whole or part of it Such evidence in the absence of these words is admissible under English law for this purpose A will revoked cannot be revived except by re execution or by a codicil (a)

The section deals with the revival of a will It therefore presupposes the existence of a will and the revocation of that will The methods of revival are two in number (1) re execution, (2) by a codicil (i) duly executed and (ii) shewing an intention to revive the will The second sub section deals with the revival of a will which has been revoked in two stages first in part and afterwards wholly According to the sub section the revival of such a will extends to the will as it stood before its complete revocation The whole will is not in consequence revived unless the testator indicates a contrary intention by his will or codicil in which case the whole will including the part that was first revoked is revived (b) Under the old law in England a will revoked by another was revived by the revocation of the revoking will but that law was changed by the Wills Act 1837 (c) Where a will was found after the testator's death but by parol evidence it was proved that by a subsequent will he had revoked all prior wills and codicils and his later will was not forthcoming but parol evidence was given of its revocation held the former will was not revived by the revocation of the revoking will but there was intestacy (d) There will be no revocation however where the doctrine of dependent relative revocation applies to the circumstances of the case (e)

3 Be revived Revival to be effective must be by re execution or by the valid execution of a codicil showing an intention to revive the testamentary instrument Destruction of the revoking will or codicil is not sufficient it is not a re execution of the revoked will according to the Act Intention to revive and reference to a prior testamentary instrument are essential The mere fact of the execution of a codicil is not enough but it must refer in some shape or other to the instrument which is set up (f)

(a) *Re Hodgkinson* 1893 P 339
 (b) *Skinner v Ogle* 9 Jur 432
 (c) *Re Brown* 1 Sw & Tr 32; *Re Hodgkinson* 1893 P 339

(d) *Re Brown* 1 Sw & Tr 32; *Hood v Hood* 1 P & D 309
 (e) *Powell v Powell* 1 P & D 209
 (f) *Burton v Newbery* 1 Ch D 234

If the later instrument calls itself a codicil to a particular will then there is sufficient reference to the will and sufficient evidence of intention to amount to a republication of the will. Where reference is to dispositions contained in the will referred to there is revival of the will (a)

4 Re-execution The re-execution must be proper and valid *i.e.*, effected in the manner required for the making of an original will otherwise the original will is not affected one way or the other (b). Where a testator's signature was cut out but gummed on to its former place but the will was in the testator's custody *held* the presumption was that the document was cancelled *animo revocandi*; re-pasting the signature did not amount to re-execution (c). If a testament was in the custody of the testator, and upon his death it is found upon his repositories mutilated or defaced the testator himself is to be presumed to have done the act and it has already appeared the law further presumes that he did it *animo revocandi*. (d) Re-execution means execution over again *i.e.* by complying with all the formalities of law required for the execution of a valid will (e).

5 Revival by codicil A codicil duly executed republishes the former will it being immaterial whether the will was properly executed or not the defect in its execution is cured by republication (f). It may revive a will with unattested alterations (g). It has been held that even a codicil that is conditional may have the effect of republishing the will or making it valid (h). But it has been established that the physical existence of the will sought to be revived is necessary. Therefore where a will has been revoked by a later will and destroyed it cannot be revived by reference in a subsequent codicil. So also where a testator has destroyed a will with the intention of revoking it a codicil referring to it with the intention of reviving it cannot effect its revival (i).

6 Intention to revive Mere re-execution without an intention to revive is not sufficient (j). Such intention is essential in case of revival by codicil. The law is fully explained in *re Steele* (k). There it has been pointed out that the theory of law was that a codicil formed part of a will and consequently to make a codicil was to affirm the existence of a will and to re-publish or reaffirm it. All codicils therefore revived their respective wills. If revoked the only difficulty lay in ascertaining to which or what will the disputed paper was intended as a codicil. The Legislature by using the words 'intention to revive' must have meant that 'the intention of which it speaks should appear on the face of the codicil either by express words referring to a will as revoked and importing an intention to revive the same or by a disposition of the testator's property inconsistent with any other intention or by some other expression conveying to the mind of the Court with reasonable certainty the existence of the intention in question. It was designed by the Act to do away with the revival of wills by mere implication. As has been

(a) *Re Wilson* 1 P & D 582 *Re Baker* (1929) 1 Ch 668
 (b) *Dunn v Dunn* 1 P & D 277
 (c) *Bell v Folger* 11 2 P & D 145
 (d) X 151 6 Ed cited in *supra*
 (e) *Re Bangham* 1 P & D 429
 (f) *Allen v Maddock* 11 Moo P C 427

Anderson v Anderson 13 Eq 351
 (g) *Re Heath* 1892 P 253
 (h) *Re Da Silva* 30 L J P 151
 (i) *Re Steele* 1 P & D 575, *Re Reade* 1902 P 75
 (j) *Dunn v Dunn* 1 P & D 277
 (k) 1 P & D 575

shortly put it appears to have been the object of the legislature to put an end equally to implied revocation and implied revivals (a) The intention should appear by express words referring to a will as revoked and there must be some expression conveying to the mind the existence of the intention in question (b) In the absence of intention therefore there can be no revival (c) The intention overrides mistakes in expression (d)

Intention to revive a will is not to be gathered from mere reference by date to a will (e) The date is an important element but it is not sufficient by itself Intention to revive must be found in the instrument (f) Where a codicil expresses no intention to revive a prior will or codicil to which it refers the instruments revoked will not be revived by such reference merely (g) In fact a codicil which refers by date and which the testator intends as a codicil to one will may be entitled to probate with another will (h) By simply attaching a codicil to a previous will the will is not revived (i) A codicil described as codicil to an earlier will does not impliedly revoke a later one (j) unless other circumstances are present (k) Where a testator by his second will revokes the first and then makes a codicil and describes it as the codicil to his first will the reference in itself has been held sufficient to revive the first will only (l) but in other cases it has been held that intention will decide whether the testator intended to revive the first will only (m)

7 Extent of revival It is also a question of intention as to how much is revived Thus if a codicil revoke a legacy given by a will and a subsequent codicil confirm the will evidence is admissible to show what was the intention of the testator The will may be revived not in combination with but as distinct from the codicil (n) The principle is plain namely in the absence of intention there can be no revival (o) and if the intention be clear an error in expression may be corrected (p) Where a testator by a will revoked a prior will and codicil and subsequently executed a paper and described it as a codicil to the revoked will held the intention was to revive the revoked will only and not the codicil (q) Where a testator gave all his properties to A and by another will devised his estate to B then revoked the second will by cutting off the signature held the first will was not wholly revoked by the second will but only to the extent of the real estate which was disposed of by the second will When the testator destroyed the second will with the intention of revoking it the

- (a) *Marsh v Marsh* 1 Sw & Tr 533
 (b) *Re Steele* 1 P & D (578)
 (c) *Re Reade* 1902 P 75
 (d) *Re Dyke*, 6 P D 207, *Re May*
 1 P & D 581 *Re Steadham*
 6 P D 205 *Re Anderson* 39 L.
 J P 55
 (e) *Re Steele* 1 P & D 575 *Re*
May 1 P & D 581 *per contra*,
Re Reynolds 3 P & D 35 *Re*
Stedham, 6 P D 205
 (f) *McLeod v McNab* 1891 A C
 471
 (g) *Re Dennis* 1891 P 326 *Re Ince*
 2 P D 111
Rogers v Goodenough 31 L. J P

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 (i) *McLeod v McNab* 1891 A C
 471
 (j) *Re Stedham* 6 P D 205, *Re*
Chilcott 1897 P 223
 (k) *Re Reynolds* 3 P & D 35
 (l) *Re Reynolds* 3 P & D 35
 (m) *Re Steele* 1 P & D 575
 (n) *McLeod v McNab* 1891 A C
 471 *Re May* (1904) 1 Ch 317
 (o) *Re Reade* 1902 P 75
 (p) *Re Dyke*, 6 P D 207 *Re*
Chilcott 1897 P 223 *Re Baker*
 (1929) 1 Cl 665 J 150 181
 7 Ed
 (q) *Re Reynolds* 3 P & D 35

revoked part of the first will was not thereby revived, but the operation of the second will in respect of the revocation of part of the first will still remained. The former will so far as it was revoked, could not be revived except by re-execution or by a codicil (a)

When a testator by a codicil confirms in general terms his will or his last will and testament, the will together with all the codicils is taken to have been confirmed. 'The will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the statute (b). On the other hand, it is equally clear that the testator may, by apt words, express his intention to revoke any codicil already made and set up the original will unaffected by any codicil (c). The authorities lay down two propositions, viz., (1) if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it, (2) the ratification of a will described by its date is a ratification of the will as modified by the codicils and, therefore, does not revoke the codicils which were made between the date of the will and the confirming codicil. In *Barton v Newbery* (d) a second codicil was held to revive the will to which a reference was made by date but not a prior codicil to which no reference was made. Mr Jarman is of opinion that the decision is erroneous on this point (e).

8 Effect of republication. A will in existence unrevoked may be republished, i.e., confirmed by a subsequent will or codicil. To republish a will is to reaffirm its validity (f). Republication, therefore, takes place when an unrevoked testamentary instrument is confirmed by a later one. The effect of republication of a will by a codicil is to make the will take effect as if it had been executed at the date of the codicil and to constitute a new will of the date of the codicil (g), unless a contrary intention is shewn (h). A codicil does not always make the will speak from the date of the codicil (i). A codicil which is merely auxiliary explanatory and supplementary to a will does not by republishing the will erase its date. Therefore the will as modified by the codicil stands (j). A charitable gift made by will is not invalidated merely by the fact that the will containing it is confirmed and republished by a codicil executed less than three months before the testator's death (k).

One effect of bringing down the date of the will to that of the later codicil is to pass after purchased property not mentioned in the will (l). Another effect of revival is to "effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original,

- (a) *Re Hodgkinson* 1893 P 339
 (b) *Lemage v Goodban*, 1 P & D 57
 (c) *Green v Tribe* 9 Ch D 231 (see cases referred to)
 (d) 1 Ch D 234 explained in *Green v Tribe* 9 Ch D 231
 (e) p 186 7 Ed See *Re Reynolds* 3 P & D 35
 (f) *Re Steele*, 1 P & D 575 578
 (g) *Dudley v Champion* (1893) 1 Ch 101, *Re Rayer*, (1903) 1 Ch 685,

- Re Hardyman* (1925) 1 Ch 87
 (h) *Hopwood v Hopwood* 7 H L C. 728
 (i) *Hopwood v Hopwood*, 7 H L C. 728, 710
 (j) *Adm Genl v Hughes* 40 C 192, 203 21 1 C. 183
 (k) *Re Moore Long v Morel* (1907) 1 Ir R. 315
 (l) *Graley v Sampson* (1917) 1 Ir R 28 (all leading cases are reviewed)

but with alterations introduced by the various codicils (a) The same rule is now applied to the case of specific gifts (b) Therefore a legatee not in existence when the will was written may take under the re published will or a legacy that has lapsed may be revived because the will after republication expresses the testator's intentions at the later date (c) 'Republication does not revive a legacy which has been revoked adeemed or satisfied (d) nor does it substitute a new legatee (e) As to the mode of republication of a will see Halsbury Vol 28 p 578

9 Parol evidence Parol evidence is not admissible to show that a testator made a mistake in referring to a particular testamentary instrument although it may be admitted for the purpose of expunging a clause by showing that it was never intended that it should form part of the will (f) In ascertaining whether a testator intended to revive a revoked will the court is precluded unless there is a latent ambiguity in the codicil from receiving any evidence except what may suffice to place it in the position of the testator (g) Intrinsic evidence may show that a reference to the date of a will is erroneous (h) but parol evidence is not admissible in this connection (i)

CHAPTER VI

OF THE CONSTRUCTION OF WILLS

74. (S. 61.) It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom

1 The section The section applies to the wills of Hindus etc This section can hardly be said to lay down a canon of construction but is inserted here by way of introduction to the rules that follow It enunciates the well known rule that no technical words or terms of art are necessary in a will (j) and states that what the testator should bear in mind in writing his will is to express his intentions clearly with the help of suitable words so that there may be no room for ambiguity, and consequently no difficulty in the construction of the words This may be said to be golden rule of drafting a will

2 Meaning of construction To construe a will means to give effect to the intention of the testator (k) Intention is the element by which the courts are to be guided in determining the effect of a testamentary disposition (l)

- (a) *Re Fraser* (1904) 1 Ch 726, *reld* to in *Re Hardyman* (1925) 1 Ch 87
 (b) *Re Fraser* (1904) 1 Ch 726 *Re Reeces* (1928) 1 Ch 351 J 1878
 (c) *Re Hardyman* (1925) 1 Ch 287 but see *Hutchison v Hammond* 3 Bro C. C. 128 (case of lapse)
 (d) *Purys v Mansfield* 3 My & Cr 359 376 *Hopwood v Hopwood* 7 H. L. C. 728 H 28 p 578 9 *Drinkwater v Falconer* 2 Ves Sen

- 623 626
 (f) *Walpole v Chlomondeley* 3 Ves 402
 (g) *Re Steele* 1 P & D 575 577
 (h) *Re Wilson* 1 P & D 582
 (i) H 28 p 577
 (j) *Hay v Coventry* 3 T R 83 86 *Ralph v Carrick* 11 Ch D 873 878
 (k) *Grey v Pearson* 26 L. J Ch 481
 (l) *Soorjeemancy v Drenobundoo* 6 M. 1 A (550)

The rules of construction are rules designed to assist in ascertaining intention (a). These rules, as set forth in the following sections, are founded on decisions of the Court of Equity and embody the results of the earnest endeavours of a long series of eminent judicial authorities to give effect to the wishes of testators as expressed in their testamentary documents (b), and these rules are intended to aid the court, where there is ambiguity, and not to get rid of the expressed words of the testator, if expressed in clear terms (c). The English rules of construction have to be applied with caution in this country (d). The courts here should take into consideration what are the ordinary notions and the wishes of Hindus, etc. (e).

3. Intention is to be gathered from the whole will. The paramount duty of the courts in construing wills is to ascertain and give to effect to the intention of the testator to be collected from the whole will and not from any particular word or expression which may be contained in it (f). The whole will must be read in the first instance without paying any attention to legal rules for the purpose of seeking the testator's intention and the meaning of the words he has used (g). Each clause must be taken in conjunction with, and interpreted by, the other portions of the instrument (h). In construing a testamentary instrument not only should the whole of it be taken into consideration so that, if possible, no part of it contradicts the other (i), but the court should look at all other testamentary instruments (j). An erroneous recital of a will in a codicil, however, will not alter the construction of the will (k).

4. How intention is to be deduced. Intention is to be collected from the words of the will (l), taking the whole of the instrument together (m). These form the materials from which the intention is to be gathered, as they convey the expression of the testator's wishes (n). In other words, the words supply the clue to the intention (o). The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood and may lead to speculation

- (a) *Ram Lal v Kanai Lal*, 12 C (578)
- (b) *Jalram v Kuverbai*, 9 B 491, 504, *Adams v Gray*, 48 M L J 707
- (c) *Re Hamlet*, 39 Ch D 426, cited in *Adams v Gray* 48 M L J 707
- (d) *Din Tanni v Krishna Gopal*, 36 C 149, 156, 13 C. W. N. 291
- (e) *Sures v Lalit*, 20 C W. N. 463, *Moulvie Mahomed v Shewukram* 2 I. A 7, 22 W R 409, *Radha Prosad v Ramee Acont*, 35 I A 118, 35 C 696
- (f) *Martin v Lee* 14 Moo P C 142, *Thellusson v Woodford*, 4 Ves (329)
- (g) *Comiskey v Bowring Hanbury* 1905 A. C. 84, *Nisar Ali v Muhammad Ali*, 119 I C 337, *Gulabji v Rustomji*, 49 B 478
- (h) *Bachman v Bachman*, 6 A (590)
- (i) *Re Bedson's Trust* 28 Ch D 523, *Shib Lakshman v Tarangini*, 8 C.

- L J 20, 27.
- (j) *Hartley v Tribber*, 16 Beav 510, see *Re Venn*, (1904) 2 Ch 52
- (k) *Skerratt v Oakley*, 7 T R. 492, W. 845, 11 Ed
- (l) *Soorjeemoney v Deenobundoo*, 6 M I A 526, 552, see *Sonatin v Juggul*, 8 M I A 66, *Tagore Case*, 9 B L R. 377, *Bhoobunmoyt v Ram Kishore*, 10 M I A 279, *Adams v Gray* 48 M L J 707
- (m) *Din Tanni v Krishna Gopal*, 36 C 149, 156, 13 C. W. N. 291, *Nisar Ali v Muhammad Ali*, 119 I C 337
- (n) *Soorjeemoney v Deenobundoo*, 6 M I A (550), *Sures v Lalit*, 22 C. L J 316, 327, 20 C. W. N. 463, *Venkatadri v Parthasarathy*, 52 I A 214
- (o) *Grey v Pearson*, 26 L J Ch 473

as to what the testator may have supposed to have intended to write whereas the only proper enquiry is what is the meaning of that which he has actually written (a) Accordingly construction is primarily directed to determining the meanings of words used in the will instead of discovering the intention of the testator 'The question in expounding a will is not what the testator meant but what is the meaning of his words The use of the expression that the intention of the testator is to be the guide unaccompanied with the constant explanation that it is to be sought in his words and a rigorous attention to them is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do instead of strictly attending to the true question which is what is that which he has written means (b) It is the writing only that is to be considered (c) Accordingly it has been stated that where there is an intention on the part of the testator overwhelmingly established upon the words of the will itself the court will decline to go beyond that (d) The rule therefore is to ascertain the intention of the testator as declared by him and apparent in the words of the will and to give effect to this intention so far as it is consistent with the law (e) The court is not at liberty to speculate upon what the testator may have intended to do or may have thought that he had actually done The court cannot give effect to any intention which is not expressed or plainly implied in the language of the will (f) The court cannot put in words simply because it may have some suspicion that in making his testamentary disposition that was the intention in his mind (g) The same rule applies to constructions of deeds (h) The question whether the intention is consistent with the rules of law or not can never arise till it is settled what the intention was (i) If the intention conflicts with any rule of law it cannot be given effect to (j) Thus, where a devise of a house was made to a legatee for life then to a charity but should there be no charity established then to the same legatee held if the charity could not get the house the testator intended it to go to the legatee (k) Words should be understood as the testator understood them or intended that they should be understood Intention is to be gathered from the language and not from anything extraneous to it Where a will is written in the vernacular the court has to see in what sense the words in the will were used by the testator (l)

- (a) *Roddy v Fitzgerald* 6 H L C 823
Re Freeman (19 0) 1 Ch 681
Wilson v Oakes 31 M 283
Papural v Chuhermal 114 I C 105
- (b) *Abbott v Middleton* 28 L J Ch 110
Soorjeemoney v Deenobundoo 6 M I A (550)
Grey v Pearson 6 H L C 61 106
Aghare v Kamini 11 C L J 461 474
Sulochana v Jagattarini 30 C L J 51 55
Simpson v Foxon 1907 P 54
Town v Wentworth 11 Moo P C 526
- (c) *Abbott v Middleton* 7 H L C (114)
Simpson v Foxon 1907 P 54
- (d) *Chapman v Perkins* 1905 A C

- 106, *Re Freeman* (1910) 1 Ch 681 691
- (e) *Hood v Murray* 14 A C 124
Egerlon v Brownlow 4 H L C 1 184
Hickling v Fair 1899 A C 15 27
- (f) *Scale v Rawlins* 1892 A C 342
- (g) *Re Cleveland & Settled Estates* (1893) 3 Ch 244 251
Scale v Rawlins 1892 A C 342
- (h) *Shore v Wilson* 9 Cl & F 355
- (i) *Hodgson v Ambrose* 1 Doug 337
- (j) *Gaird v Baldwin* 2 Ves Sen 646 655
- (k) *Hall v Warren* 9 H C L 420
- (l) *Pramu Ammal v Serunatha* 86 I C 737

"But from the imperfection of language it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used." "The same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of another testator's affairs and family" (a). In construing a will the intention of the testator should be ascertained. For the purpose of ascertaining the intention, the will should be read by the light of surrounding circumstances (b). Primarily the words of the will are to be considered, and next the surrounding circumstances when the testator's meaning may be affected by them (c).

5. How words are to be interpreted. It is a cardinal rule of construction that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention (d). The broad rule of interpretation has been thus stated: That which the testator has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptance of the words used with the assistance of such parol evidence of the surrounding circumstances, as is admissible, to place the court in the position of the testator (e). To construe is to place one self in the position of the testator (f). The court must look to all the clauses of the will and give effect to all the clauses, ignoring none as redundant or contradictory and the meaning of a word may be modified by the context (g).

The first rule, therefore, in construing all written documents is that the grammatical and ordinary sense of the words is to be adhered to unless that would lead to absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnance or inconsistency, but no further (h). This is the *prima facie* rule of construction with which the court should start (i). Rules of grammar and the usual meaning of technical words may be disregarded in case of wills of illiterate persons but no words can be struck out which has a clear and definite operation in the disposal of his property (j).

A word in a will must receive its natural and ordinary meaning, even though it may make a gift capricious, unless such meaning is prohibited by any rule of

- (a) Per Blackburn J in *River & Co. v. Adamson*, 47 L. J. Q. B. 193, 202; see *Webber v. Stanley*, 16 C. B. N. S. 698, 751.
 (b) *Dhanapala v. Anantha*, 24 M. L. J. 418; 18 I. C. 973.
 (c) *Bhuggobutty v. Goarao Prasanna*, 25 C. 112, 124 (not a case of will) see *Srinibash v. Monmohini*, 3 C. L. J. 224.
 (d) *Doe v. Gallint*, 5 B. & Ad. 621, fold in *Lalit v. Chukkan*, 24 I. A. 76; 24 C. 834. *Sures v. Lalit*, 22 C. L. J. 316; 20 C. W. N. 463.

- (e) *Roddy v. Fitzgerald*, 6 H. L. C. (876), approved in *Doe v. Gallint*, 6 B. & Ad. (621).
 (f) *Venkatadri v. Parthasarathy*, 52 I. A. 214.
 (g) *Shib Lakshan v. Tarangini*, 8 C. L. J. 20 ("Malik").
 (h) *Grey v. Pearson*, 26 L. J. Ch. 473. *Abbott v. Middleton*, 7 H. C. L. 68, 114; *Wilson v. Oakes*, 31 M. 283, 286.
 (i) *Re Coley*, (1903) 2 Ch. 102.
 (j) *Hall v. Warren*, 9 H. L. C. 420.

ascertain whether there exists any person or thing to which the whole description given in the will can, reasonably and with sufficient certainty, be applied (a). Thus, in order to avoid a repugnancy between the language of the testator and the facts of the case, children may mean illegitimate children (b), or wife may mean not a legally married but a reputed wife (c).

7. **Extrinsic evidence and parol evidence** Extrinsic evidence is not admissible where the words of a will are perfectly clear, but parol evidence is admissible to explain them in order to ascertain the persons and things insufficiently described or explained by them, the fundamental distinction being between evidence in 'explanation of the words of the will themselves and evidence sought to be applied to prove to intention itself' (d). Evidence is admissible to explain the meaning of the words used by the testator as distinguished from the evidence of the testator's intention. It is also admissible to show that expressions used in a will had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes, and the sense and meaning of the language may be investigated and ascertained by evidence *de hors* the instrument itself' (e).

8. **Addition and alteration of words.** Where an estate has been created by express words it would be a strong thing to control and override such words by any other part of the will unless it is explicit. The court cannot put in words simply because it may have some suspicion that in making his testamentary disposition that was the intention in the mind of the testator (f). The court will decline to alter a clause in a will where there is no ambiguity (g). In such a case to substitute one word for another "would be doing a violence to the language which nothing would warrant but a clear and unmistakable intention collected from the other parts of the will (h). Conjecture is quite inadmissible to control the expressions of a will (i). Courts have even gone further and said that if effect cannot be given to a will without straining the words of the testator, the courts will not be justified in taking such liberty with a will. Therefore, where an attempt to create an estate tail under the will of a Hindu was held to be void, the legatees were held entitled to life estates and not heritable estates (j). Similarly, where the words of a bequest are wholly insensible, the property will go as in the case of intestacy (k). There must be a reasonable certainty as to the persons who are to take and the estates they are to take before a gift can be implied (l). Where the will was written by a person who knew nothing of the

- (a) *Re Harrison* (1894) 1 Ch 561.
 (b) *Re Harrison* (1894) 1 Ch 561.
 (c) *Re Homer*, 37 Ch D. 695. See S 100 and note.
 (d) *Re Glassington*, (1906) 2 Ch 305.
Re Gralinger, (1900) 2 Ch 756 considered.
 (e) *Re Rayner* (1934) 1 Ch. 176. *Re Glassington*, (1936) 2 Ch 305, see *Ramlal v S.S. for India* 7 C. 304 P. C.
 (f) *Scale v Rawlins*, (1892) A C. 342, see *Soorjeemoney v Deenabundoo*, 6 M 1 A 526 552 cited above.
Venkata v Parthasarathy 52 1 A

- 214
 (g) *Hamilton v Ritchie*, 1894 A C 310.
 (h) *Re Hamlet*, 39 Ch. D (442).
 (i) *Gurusami v Sioakami* 22 1 A 119. 18 M 347, see *Re Freeman*, (1910) 1 Ch 681, 691.
 (j) *Krislamoney v Narendro*, 16 1 A 29 16 C 353, see *Hoy v Earl of Coventry* 3 1 R. 83.
 (k) *Hall v Warren*, 9 H L C 420.
 (l) *Anand Rao v. Adm Genl*, 20 B 450, 465. *Decshankar v Motiram* 18 B 136.

testator's family and there was an error in the name of a legatee the court refused to rectify the mistake (a)

9. Absolute and limited interests An absolute gift may be cut down by an indication to the contrary expressed in the will (b) or in consideration of what are known to be the ordinary notions and wishes of the Hindus with regard to the devolution of property (c). But an absolute gift made by a will cannot be cut down by subsequent words unless they clearly have an effect to restrict it (d). A power of absolute disposition created in favour of a donee (e.g., a widow) indicates an intention to create an absolute interest in favour of the donee (e) unless all the provisions taken together indicate that the donee was to take only a life interest coupled with a power of appointment (f) but the gift will not be construed in this limited sense if there be in so many words a clear and absolute gift (even if the donee be a Hindu widow) (g). A gift over if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate, is void both as regards realty and personalty (h) similarly when an absolute interest has been given to the first taker a gift over of what may not be required by him is void for uncertainty (i).

10 Technical words No technical words are necessary for a will (j). With regard to technical words or words of known legal import the rule is that they must have their legal effect even though the testator uses inconsistent words unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense (k). Another rule of construction that prevailed was that where two intentions were apparent on the face of the will both of which could not take effect namely a general and a particular intent the courts ascertained what was the general and paramount intention of the testator and then construed the will so that the particular intention should give way to such general paramount

(a) *Charter v Charter* 7 E. & I App 364

(b) *Comiskey v Bowring Hanbury* 1905 A. C. 84

(c) *Moulte Mahomed v Sewkram* 2 I. A. 7, 14 B. L. R. 226 *Radha Prasad v Ranimont* 35 I. A. 118, 35 C. 696

(d) *Tripurari v Jagat Tarini* 40 I. A. 37, 40 C. 274, see *Sures v Lall* 22 C. L. J. 316 322 20 C. W. N. 463 (see cases cited to)

(e) *Tootli v Modan* 28 C. 499 *Amarendra v Surachant* 14 C. W. N. 455 *Seth Mulchand v Bal Mancha* 7 B. 491 *Jogeswar v Ramchund* 23 I. A. 37 23 C. 670

(f) *Haji Kumari v Mohim* 7 C. L. J. 540, 12 C. W. N. 412 see *Sarda v Aristo* 5 C. W. N. 360, *Dhanapala v Anantha* 24 M. L. J. 418, 18 I. C. 973

(g) *Sures v Lall* 22 C. L. J. 316 321 20 C. W. N. 463

(h) *Sures v Lall* 22 C. L. J. 316 322, 20 C. W. N. 463, *Tripurari*

v Jagat Tarini 40 I. A. 37, 40 C. 274

(i) *Alcasorie Bank v Rajnor* 9 I. A. 70 80 7 A. C. 321 331 4 A. 500

(j) *Din Tarini v Krishna Gopal* 36 C. 149 156. It is not necessary that any technical or artificial form of words should be used in a will but we must collect the meaning of the testator from the words which he has used and cannot add words which he has not used *Hay v Gal of Coventry* 3 T. R. 83 86. Technical words are not necessary in wills if the intent on is clear as they are necessary in some other instruments *Ralph v Corrick* 11 Ch. D. 873 878

(k) *Rod's v Fitzgerald* 6 H. L. C. 873 876 agreed in *Doe v Gallant* 5 B. & Ad. 671 1013 in *Lall v Chakran* 24 I. A. 76 24 C. 334 and in *Huxon v Oakes* 31 M. 283 303, *Town v Wentworth* 11 P. C. 526, *Fordhook v Fordhook* 3 Ch. 93, *Alcas v Gros* 45 M. L. J. 707

intention This doctrine has been qualified in the following manner in *Jesson v Wright* (a) that the general intent shall override the particular is not the most accurate expression of the principle of decision The rule is that technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise Accordingly it has been observed that arguments founded upon the supposed general intention of a testator require to be carefully watched (b) A word may have a plain meaning and a technical one and the rule of construction applicable will differ according to the view the court takes of the meaning of the word (c)

11. Function of courts The court cannot decline the jurisdiction to declare the meaning of a will (d) As to the foundation of the jurisdiction of courts in India in respect of construction of a will see *Srinibas v Monmohini* (e) Courts must go by the words of the testator and not speculate upon his intention (f) The judgment of a court in expounding a will should be simply declaratory of what is in the instrument (g) Of all the cases which come before the court for its decision none can be more embarrassing and more unsatisfactory than those which arise upon the construction of wills The court has no real guide to enable it to arrive at a conclusion (h) The House of Lords has rejected the argument as inconvenient in the construction of wills (i) The office of a judge it has been said is not to legislate but to declare the expressed intention of the legislature even if that intention appears to the Court to be injudicious (j) The court should look to the words of the will alone to determine the operation and effect of a gift and disregard altogether the legal consequences which may follow from the words as regards the nature and qualities of the estate when such estate is once collected from the words of the will (k) The question whether the intention is consistent with the rules of law or not can never arise till it is settled what the intention is (l) Except on isolated words and phrases decided cases are not of much real service in the construction of wills (m) but it has been observed that the judges are bound to have regard to any rules of construction which have been established by the courts and to construe a will as plain legal minds would do (n) Where the language is clear the construction cannot be altered because it is harsh or capricious (o) But where a will admits of two constructions that which bespeaks a

- (a) 2 Bl 1 56 7, see *Roddy v Fitzgerald* 6 H L C 823 876, *Doe v Gallin B & Ad* (640), see *Re Fraser* (1904) 1 Ch 111 117 *Re Simcoe* (1913) 1 Ch 552
 (b) *Gibbons v Gibbons* 6 A C 471
 (c) *Gibbons v Gibbons* 6 A C 471 see *Re Sheppard's Trust* 1 K & J 269 The technical meaning prevails in *Wilmot v Wilmot* 8 Ves 10
 (d) *Crofts v Beamish* (1905) 2 K R 349 362 3
 (e) 3 C. L. J. 224
 (f) *Scale v Rawlin* 1892 A C 342, *Gurusami v Siskami* 22 1 A 119 18 M 347 *Sures v Lalit* 22 C. L. J. 316 327 20 C W N 463 (See cases cited) *Soorjemaney v Deenobund* 6 M 1 A (553)
 (g) *Wigram cited in Re De Rozaz* 2 P D 44

- (h) *Re Ingle's Trust* 11 Eq 578
 (i) *Martineau v Briggs* 23 W R 859
 (j) *River & v Adamson* 47 L J Q B 193
 (k) *Sackborough v Seville* 3 A. & C. 897 962
 (l) *Hodgson v Ambrose* 1 Doug 337 342
 (m) *Wilson v Oakes* 31 M 283 288 (see cases cited to) The words in trust was held not to create a trust see *Combs Key v Bowring Hanbury* 1905 A C. 84 89
 (n) *Ralph v Carrick* 11 Ch D 873 878
 (o) *Dungannon v Smith* 12 Cl & F 546 599; *Pearks v Mosley* 5 A C. 714 719 733 *De Beaulieu v De Beaulieu* 3 H L C 524 545 *Abbott v Middleton* 7 H L C 69; *Hathunt Erlington* 2 A C 699 709, *Martin v Holgate* L R 111 L 175 187

reasonable and probable intention is to be adopted, that which would indicate an intention unreasonable, capricious and inconsistent with the testator's views, as evidenced by his conduct and by the dispositions of his will, is to be rejected (a). Courts would decline to adjudicate upon rights of parties in a contingent event (b), or to determine questions of title as to future interest (c), or to make any declaration affecting the rights of persons who are not parties to the proceeding (d)

12 Utility of the rules. The rules which are to govern the constructions of wills, as well as all other written instruments, are now very clearly established, and it is impossible to overrate the importance (notwithstanding all the temptations from supposed hardship or probable intention) of steadily, strictly and faithfully adhering to those rules, for the sake of the great interest of society in avoiding litigation, and affording the only chance of obtaining certainty in the construction of wills, as such a subject is capable of (e) Decided cases, however, are of very little assistance in interpreting a will, except in so far as they lay down broad canons of constructions (f) The will of one testator cannot be construed by reference to that of another (g) The rigidity of the rules of construction however, sometimes defeats the intention of the testator when his language is clear and the courts are thereby precluded from giving effect to an intention not expressed by him (h) Half the disputes arise from a consideration of what the canons of constructions mean unaffected by the circumstances of each particular case "If you lay down a canon of construction which is supposed to meet every case you are absolutely certain to go wrong" (i)

13. English rules of construction and Indian wills The rules of construction established in English courts for construing English documents have grown up side by side with a very special law of property and a very artificial system of conveyancing It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question (j) Therefore if in translating a testator's words into English some technical words come to be used, the former words are not

(a) *Moharun' Isfar v Moharun' Isfar*, 15 I A 127, 147, 15 C 725

(b) *Ram Lal v S of S for India*, 8 I A 46 7 C (317)

(c) *F. Yorke v Tribhooandas*, 19 B 401, *Kathama v Dorasinga*, 2 I A (190) relied on, *Bar Motilahu v Mamubai* 21 B 703

(d) *F. Yorke v Tribhooandas* 19 B 401, *Ramlal v S of S for India*, 7 C 304, *Lalit v Chukkun* 24 I A 76 24 C 834, *Crofts v Beamish* (1905) 2 I R (362 3) (In a suit for construction all interests that may in any event be affected must be present)

(e) *Abbott v Middleton* 7 H L C (114)

(f) *Yethirajulu v Mukunthu*, 28 M 363 *Venkatadri v Parthasarathy* 52 I A 214 cited in *Agnes v Murray & Co* 79 I C 1026

(g) *Re. Pounder* 56 L J Ch 113, *Re Williams*, (1897) 2 Ch 12, 22, *Seale*

Hayne v Joffell 44 Ch D 590, on app 1891 A C 304, see *Re Coley*, (1903) 2 Ch 102, "each case depends prima facie upon the words of the particular will plus the surrounding facts in the particular case" *Raghubath v Dy Commr*, 56 I A. 372 58 M L J 1, *Nisar Ali v Muhammad Ali*, 119 I. C 337, 344, *Dinbai v Nusserwanji*, 49 I A 323, 49 C 1005, following *Narendranath v Kamalbasini*, 23 I A 18, 23 C 563, and *Bhagobati v Kalicharan*, 38 C 469, 15 C W N 393 P. C

(h) *Re Cleveland's Settled Estates*, (1893) 3 Ch 244 251

(i) *Barracough v Copper*, (1908) 2 Ch 121 n

(j) *Ramlal v Kanailal*, 12 C. (678), *Narendra v Kamalbasini* 23 I A. 18, 23 C 563

necessarily to receive the technical meaning ascribed to the English words (a) Further, the courts in India are bound by the provisions of a consolidatory Statute, the object of which is to place the principles of law upon a footing more specific and more certain than the practice of English courts. In interpreting those statutory provisions the courts are specially to guard themselves against being guided too much by the English cases and too little by the words of the Statute It should also be remembered that in many matters the Succession Act has departed from the rules and principles adopted in England (b) The court should not also allow itself to be influenced by any consideration of the previous state of the law (c)

Where the rules of English law are applied by analogy to Hindus, those relating to personality are more frequently resorted to than those relating to realty (d). In construing the will of a Hindu it is not improper to keep in mind what the Hindu law is and what it permits even though the testator himself be ignorant of the law (e), or to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, thus, where the Hindu Wills Act did not apply a gift to wife under a Hindu will, in the absence of express terms giving a heritable right or power of alienation was held to confer only a Hindu widow's estate (f)

14. Certain special rules Words of futurity, *eg* in case of a proviso to take effect on the legatee becoming bankrupt (g), or, in the case of a proviso for defeasance of an estate tail on the donee in tail being born in his (testator's) lifetime, are not allowed to operate to defeat the manifest intention of the testator (h) If there be clear words making a gift vested clear words are required to convert it into a contingent one (i)

15 Procedure The question how far the old practice of the Court of Chancery, namely, a suit for administration is necessary for the purpose of construction of a will is discussed in *Bhuggoluttu v Goorooprasad* (j) All interests that may in any event be affected must be present (k)

75. (S. 62) For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested

Inquiries to determine questions as to object or subject of will

(a) *Hariss v Brown* 20 C 621 5 C W N 729 P C

(b) *Bachman v Bachman* 6 A (593) *Narendra v Kamalhasini* 23 I A 18 23 C 563, *Gulhall v Rustumji* 49 B 478 95 I C 228 233

(c) *Ramnandi v Kalawati* 7 Pat 221, 32 C W N 402 P C

(d) *Ram Lal v Kanai Lal* 12 C. 663 (83) *Jacodai v Kailash* 15 B 185

(e) *Kanandas v Ladhakshu* 12 B 185

(f) *Lakshmi v Hirabai* 11 B 69 on app 573 *Motilal v Jide* Gen 33 B 277 *Jinna v Ramabai* 27 A 364

(g) *Bhobalarini v Peary* 24 C 646, 1 C W N 5 B Q *any will under this presumption attests a complete settlement*

of S 57 in view of this ruling that in respect of a case to which the Hindu Wills Act applied a gift of immovable property to the wife would pass all absolute interest unless a contrary intention was expressed *Carolapathi v Cota Nammalwariah* 33 M 91, *Bhobalarini v Peary* 24 C 646 *Saroda v Aristo* 5 C W N 330

(g) *Sturges v Peacock* 7 Ch 249

(h) *Gibbons v Gibbons* 6 A C 471

(i) *Re Duke* 16 Ch D 112; *Hale v Hale* 12 Ch D 751

(j) 25 C 112

(k) *Crisis v Beamish* (1935) 2 L R 341 362 J

under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact & knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations

(i) A, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grandchild, or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(ii) A, by his will, leaves to B "my estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject matter of the bequest, that is to say, what estate of the testator's is called Black Acre.

(iii) A, by his will, leaves to B "the estate which I purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

1. The section. The section applies to the wills of Hindus *etc.* It empowers courts to avail themselves of extrinsic evidence for the purpose of determining questions as to what person or what property is denoted by any words used in a will. Where the testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred, the Judge is precluded from going outside the actual words used by the testator. (a) An instrument which is free from ambiguity is to be construed according to the plain ordinary meaning of its terms together with the surrounding circumstances and with what may be inferred by necessary or reasonable implication from the language of the instrument. Words in such a case are not to be imported in the instrument upon mere conjecture of what might probably have been intended. (b)

The rule has been thus stated by Sir J. Wigram — Proposition V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may enquire into every *material fact* relating to the person who claims to be interested under the will and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

2. Inquiry into material facts. In construing a will it is necessary that the court should put itself as far as it can in the position of the testator and interpret his expressions as to persons and things, with reference to that degree of knowledge of those persons and things which so far as it can discover, the testator possessed. (c) The court may look at the surrounding circumstances existing at the time when the testator made his will. "You may place yourself, so to speak, in his arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention."

(a) *Pestonj v Framh* 12 Bom. L. R. 863.

(b) *Thompson v Doe & Indlaneth* 2 I. A. 256 see previous S. note.

(c) *Gale v Carter* L. R. 7 H. L. 354 372, *Wheeler v Harrop* (1871) 1 Ch. 455.

But a settlement subsequently executed is not to be looked at (a) The testator is presumed to have intended to refer to some existing matter or thing (b) Accordingly persons designated or things left by his will may be found by admitting proper external evidence (c) 'The court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied (d) All facts relating to the subject matter and object of the devise the mode of acquiring it the local situation, the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will (e) The court must also consider the surrounding circumstances the position of the testator his family relationships, the probability that he used words in a particular sense as well as his race and religious opinions (f) It is like evidence of parcel or no parcel in a deed You must admit evidence to show who constitute the class of takers, and what constitutes the property which is dealt with but evidence tending to show an improbability of intention on part of the testator to benefit a class answering to the description is not admissible (g) But this does not mean however that the court is in the first instance to view the surrounding circumstances in order to construe a will (h)

3 When evidence is admissible The court is no doubt bound by the primary signification of the words used in a will But it will not do to carry it too far because when a man makes his will it is fair to presume that he uses ordinary language in its ordinary sense instead of its original signification Further evidence has always been admitted to prove that the use and custom of particular places affix to certain words particular meanings Thus evidence was admitted to show that the term nephew in a will referred to the nephew of the testator's wife and not of the testator himself both having the same name (i) though the term when used as the sole description of a class must be construed to refer only to the sons of the brothers and sisters of the testator (j)

4 For determining questions as to person Evidence of surrounding circumstances is admissible to ascertain the object of a testator's bounty (k) Where a testator describes a legatee as the wife of A evidence is admissible to show that the testator knew that the person designated as the wife was not in fact the wife other wise the court cannot arrive at the conclusion that the testator was using the word 'wife' otherwise than in its legal meaning (l) Where the

- (a) *Boyes v Cook* 14 Ch D 53 *Re Harrison* (1894) 1 Ch 561
- (b) *Re Ofner* (1909) 1 Ch 60, *Re Halsall* (1912) 1 Ch 435
- (c) *Higgins v Dawson* 1902 A C 1
- (d) *Chatter v Charter* L R 7 H L 354 377, *Re Brake* 6 P D 217, *Re Taylor* 34 Ch D 255 *Re Granger* (1930) 2 Cl 756 1932 A C 1 *Re Roy* (1916) 1 Ch 461
- (e) *Doe v Martin* 4 B & A J 771 755
- (f) *Penkata v Parthasarathy* 52 1 A 214 see *Dhanapala v Ananba* 24 M L J 415, 181 C 673

- (g) *Sherril v Mountford* 8 Ch 928
- (h) *Higgins v Dawson* 1902 A C 1
- (i) *Grant v Grant* 2 P & D 8 *Bhuggobullu v Gopoo Purohita* 23 C 112 124
- (j) *James v Smith* 14 Sim 214 see *Upton v Jeans* (1875) W N 93
- (k) *Re Taylor* 34 Ch D 255 *National Society v Scottish National Ac.* 1915 A C 207 (evidence is admissible where a legatee is accurately named)
- (l) *Re Horner* 37 Ch D 673 followed in *Re Harrison* (1894) 1 Ch 561

object of a gift is not indicated with certainty but could be made certain by enquiry, evidence of extrinsic facts is admissible, *eg*, a gift to persons who would be partners of the testatrix, so also where a person is described only by a nickname (a), or an initial (b), or by a name by which the legatee was called by the testator which was not his real name (c) But evidence will not be admissible when the description is so imperfect as to be useless (d)

5 For determining questions as to property. Extrinsic evidence is admissible to ascertain whether there is any property to which the legacy can refer, or whether there is a power of appointment and to what it extends (e), or to show what properties the testator understood to be comprised in the description of a gift (f) Thus, if a testator leave 'my estate called Blackacre' (g), or 'the estate which I purchased of C,' or 'the house I live in' (h), evidence is admissible for ascertaining the actual subject of the gift So also where the subject of a devise is described by reference to some extrinsic fact, evidence is admissible to ascertain that fact (i) Habits of the testator are also receivable in evidence (j) Where a testator, a jeweller, who in the course of his business employed certain private marks, mentioned the amount of legacy by means of symbols, evidence was admitted to show the meaning of the symbols (k) Evidence is also admissible where there is an erroneous description of the object of a gift, *eg*, where a testator makes a gift of shares in a company when those shares have been converted or otherwise dealt with (l), or where a testator devises lands described as situate in a particular place when in fact it is situated in another place (m) Where a testator had two closes evidence was admitted to show that he used the term 'close' in the sense which it bore in the country where the property was situate as denoting a farm (n) Extrinsic evidence is admissible to show whether after acquired properties were intended to pass (o) For evidence of surrounding circumstances as helping to ascertain the testator's intention, see *Bhaya Sher v Bhaya Ganga* (p) But evidence of surrounding circumstances to ascertain the testator's intention will not be admitted when the language of the document is clear (q)

- (a) *Baylis v All Gent* 2 Atk 239,
Hunt v Hort 3 Bro C C 311
- (b) *Abbott v Massie*, 3 Ves 148,
Clayton v Lord Nugent 13 M &
W 200 207
- (c) *Lee v Pain* 14 L J Ch 346,
see *Camoy v Blundell*, 1 H L C
786
- (d) *Goodinge v Goodinge*, 1 Ves Sen
231, *Green v Howard* 1 Bro C
C 31
- (e) *Re Mayhew* (1901) 1 Ch 677
- (f) *Webb v Byng* 1 K & J 580,
Castle v Fox, 11 Eq 542, *West*
v Lawday 11 H L C 375,
Whitfield v. Langdale, 1 Ch D
61
- (g) *Goodtitle v Southern* 1 M & Sel,
299
- (h) *Doe v Collins* 2 T R 498
- (i) *Rickells v Tarquand* 1 H L C
472, *Goodtitle v Southern*, 1 M

- & Sel 299, *Gauntlett v Carter*,
17 Beav 586, *Harrison v Hyde*,
2 H & N 805 J 484 5 7 Ed
- (j) *Doe v Hiscocks*, 5 M & W 363
- (k) *Kell v Charmer* 23 Beav 195
- (l) *Trinder v Trinder*, 1 Eq 695 fold
in *Flood v Flood*, (1902) 1 Ir R
538
- (m) *Miller v Travers*, 8 Bing 244, see
Charter v Charter, L. R 7 H L.
364
- (n) *Richardson v Watson* 4 B & Ald
787, see also *Doe v Earl of Jersey*,
3 B & Cr 870
- (o) *Webb v Byng* 2 K & J 669,
Castle v Fox 11 Eq 542, *Re*
Potter 83 L T 405
- (p) 41 I A 1, 36 A 101
- (q) *Spencer v National Association*
(1915) 1 Ch 673, 84 L J Ch 489,
see *Higgins v Dawson*, 1902 A C.
1 see previous S Note.

Carton estate' were allowed to be substituted for the words 'the said Lea Knowl estate' used by the testator (a). So also a mistake in the numbering of a schedule was corrected by allowing 'fourth' to be read as 'fifth' (b), and the words 'all and without issue' were changed into 'any and leaving issue' (c) 'or' into 'of' (d), 'one' into 'no more' (e)

Cases. In *Narayan v Adm Genl.* (f), the words 'subject nevertheless to the trust for maintaining my said daughter,' were held to have been intended by the testator to apply in the event of the daughter being otherwise unprovided for. So also the words, 'if my son dies,' in order to be consistent with the other provisions were held to mean 'dies during minority' (g), similarly, the expression 'in the event of both (legatees) dying without issue' a gift over to others was held to mean 'if both died under 21,' when alone the gift over would take effect, for an indefinite failure of issue would make the gift void for remoteness, and the court would struggle against a construction that would defeat the obvious intention of the testator (h). A gift to the testator's sister in those words, 'you and the generations born of your womb successively enjoy the same. No other heirs have right of interest,' was held to confer an absolute estate on the sister but defeasible on the failure of issue living at the time of her death (i). A gift to the first son of A severally and successively in tail male was construed as a gift to the first and other sons of A (j). The words, 'rights have been construed as 'rights of immediate enjoyment' (k), 'without issue' as 'without leaving issue' (l). Where there was a gift to two sisters with a direction for a gift over to the survivor in case of death of a legatee, it was held to mean in case of death of a legatee during the lifetime of the testator, so that if both survived the testator the gift over would fail to take effect (m).

78(S. 65). If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect

Rejection of erroneous particulars in description of subject

Illustrations

(a) A bequeaths to B "my marsh lands lying in L and in the occupation of X." The testator had marsh lands lying in L but had no marsh lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous, and the marsh lands of the testator lying in L will pass by the bequest

- (a) *Re Northern's Estate, Salt v Fynn* 25 Ch. D. 153, *Thellusson v Rendelsham* 7 11 L. C. 423, 494
 (b) *Hart v Tulk* 2 D. G. 11 & G. 300
 (c) *Doe v Gallant* 5 B. & A. 121
 (d) *Re Dayrell* (1904) 2 Ch. 496
 (e) *Moore v Beasley* 33 L. T. 103,
Right v Day 16 Est. 67.
 (f) 21 C. 143 C.K.
Tara Churn v Suresh 16 I. A.

- 166, 17 C. 122
 (g) *Kirkpatrick v Kirkpatrick* 13 Ves. 476 see *Albott v Middleton* 7 H. L. C. 63; but see *Ellie v Ellie* 13 Eq. 156 J. 557
 (h) *Abbotson v Hurlish* 4 C. 23
 (i) *Miller v Tootal* 11 H. L. C. 143
 (j) *Moskoon v Gonesh* 1 C. 104
 (k) *Raffell v Raffell* 1 Keen 445
 (l) *C. v. Lee v Reus* 8 Ves. 32; see *J. v. J. v. J. v. J.* 6 Est. 406

(ii) The testator bequeaths to A "my zamindari of Rampur." He had an estate at Rampur but it was a taluq and not a zamindari. The taluq passes by this bequest.

1. The section. The section applies to the wills of Hindus, etc. It deals with misdescription of property, S. 76 with that of persons. This section refers to legacies, the other to legatees. The maxim applied is *falsa demonstratio non nocet*, a false description does not by itself vitiate a gift (a) The rule can only apply where the description consists of more than one part, some of which are true and some are false, and the property can be sufficiently identified with legal certainty from the description of it given in the will which is true and there is nothing to which the description in its entirety can apply (b) The rule presupposes a clear and certain description sufficient to identify the object of the gift and an incorrect description (c) "A false description of a person or gift will not vitiate a gift in a deed or will if it be sufficiently clear what person or thing was really meant" (d) The general rule has been thus stated — As to the case where there is property in respect of which all the facts of the description are found to be true so that the property exactly fits the description, the whole of that property and nothing more passes (e). As to cases where there are properties in respect of which none of the facts of the description are true no property passes. Where the enquiry results in a third alternative, viz., where there is property in respect of which some of the facts of the description are true and some are not, there the court must enquire whether the part of the description which applies to the property is a complete description of a subject of the devise, so that the misdescribing part may be justly regarded as a mistake and rejected as a false demonstration, in order to prevent a total failure of the devise (f) The question has been elaborately discussed in *re Brocket* (g), where there was a devise of real estate, to which the testatrix became entitled under a codicil to her father's will followed by an enumeration of the property, to her sister with remainder over. In addition to the specified properties, there was another to which she was entitled, but there was no evidence to show that she knew that it formed part of the property to which she was entitled under the codicil. Here was, first, a general description, in this sense uncertain, that inquiry and investigation with some possibility of error were necessary to ascertain the particulars of the real estate. The second description was more definite and specific, as it was by name and locality, and an absolutely certain and complete description on the face of it. Why was the second description added, asked the court, were it not with the intention of making that certain what was more or less obscure before, and to prevent any error or

- (a) *Schloss v Stibel*, 6 Sim 1, fold in *Court of Wards v Venkata*, 20 M 167, 187
 (b) *Cowen v Truefitt* (1899) 2 Ch 309, *Anderson v Berkeley* (1902) 1 Ch 936 940
 (c) *Doe v Galloway* 5 B & Ad 43
 (d) *Re Brocket*, (1908) 1 Ch 185
 (e) *Millard v Bailey* 1 Eq 378, *Pedley v Dodds* 2 Eq 819, *Bernasconi v Atkinson* 10 Hare

- 345, *Charter v Charter* L R 7 H L 364, *Harison v Hyde* 4 H & N 805, *Stanley v Stanley* 2 J & H 491, *Smith v Ridgway* L R 1 Ex 331
 (f) *Webber v Stanley* 16 C.B (N S) 693
 (g) (1908) 1 Ch 185 see *White v Birch* 36 L J Ch 174 and other cases told to

misunderstanding, held, that only the properties enumerated passed. Here it should be noted the description by enumeration formed the leading description and not the general description of properties to which the testatrix was entitled under her father's codicil. The former was certain, the latter was vague. But it has also been stated that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift (a). There is, therefore, no rule that the first part of the description, or the general description, is always to prevail and that the subsequent enumeration of particulars is always to be rejected. The question in all these cases is, which part enables the court sufficiently to identify, from the description given in the will, the thing which the testator intended to bequeath. As has been pointed out, the existence of this rule is based on the fact that people or people's scribes do constantly blunder in their description and enumeration of the particulars of their property. The question which the court will have to decide in such cases is whether there has been a mistake on the part of the testator or whether what appears to be a blundering enumeration of particulars is really a designed limitation of the gift itself (b). The rule on this point has been thus laid down in *Hardwick v. Hardwick* (c).—'If the words of description when examined do not fit with accuracy, and if there must be some modification of them in some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly, in order to see what are the leading words of description, and what is the subordinate matter and for this purpose evidence of extrinsic facts may be regarded'. Thus, where a testator devised his Briton Ferry estate with all lands, etc., and subsequently described it as situate in the county of G, whereas part of it only was situate in the county B, held, the entire estate passed (d).

2 Where there is no property answering the description. The rule laid down in the section will apply only where there is no property answering the description given in the will. Where there is any such property the words of the will cannot be enlarged or restricted so as to include any other subject or part thereof (e), nor can evidence be resorted to for showing that something different from the description was intended by the testator (f). It is only in cases where the terms of gifts have been ambiguous or otherwise defective and uncertain that the rule laid down in this section will apply (g). Thus in the following cases misdescription was held not to effect the legacy. In *re Weeding* (h) the question arose whether by gift of shares in two railway companies the debenture stock passed when the testatrix had in fact no shares in either. The court held it would, as the will clearly showed an intention to pass something. The bequest was not

- (a) *West v. Lander*, 11 H. L. C. 375, cited in *Tekhoran v. Krishnam* 18 B. 293 (case of transfer inter vivos).
 (b) *Tracer v. Bindell*, 6 Ch. D. 436 (general description prevailed). *Moore v. Prehn* (1920) 1 Ir. R. 233 (8 leaves passed under a gift of 7), see *Wether v. Stanley* 16 C. B. 569, 573, but see *Cunningham v. Biler* 3 Gr. 37. *Hardwick v. Hardwick* 16 Eq. 163, *Emelin v. Hyle* 10 H. L. C. 1, where the

- maxim was held not to apply.
 (c) 16 Eq. 163.
 (d) *Doe v. Earl of Jersey*, 1 B. & All. 550.
 (e) *Wether v. Stanley* 16 C. B. N. S. 699, *Re Seal* (1874) 1 Ch. 316, 323.
 (f) S. 79.
 (g) *Hardwick v. Hardwick* 16 Eq. 163.
 (h) (1871) 2 Ch. 364; *Re Nottage* (1875) 2 Ch. 657.

intended to be inoperative. Of course if the testatrix had any shares in any of the companies the result would have been different (see next section). Similarly, a gift of all the testator's money in the Bank of England was held to pass stock in the funds, the testator never having had any cash in the Bank (a). So also a gift of "all my shares in the W and S Banking Company" was held to pass, evidence being admitted, the shares in Barclay & Co Ltd, with which the other bank was amalgamated. Evidence is admissible not of the testator's intention but of the surrounding circumstances (b). But where a testator bequeathed in trust 'fifty shares in the York Union Banking Co.,' an unlimited company, which to the testator's knowledge was converted into a limited liability company, it was held the bequest had become void for uncertainty (c). So a gift of debentures was held not to pass the debenture stock into which the testator had converted them (d). *Falsa demonstratio* does not mean mistake, therefore if the testator gives something which he has not got the legacy will fail (e).

3 Devise of lands at a particular locality. Where a testator devises all his lands at a particular locality, extrinsic evidence is not admissible for the purpose of showing that he intended to pass other lands not situate at that particular place either by reason of such other lands having been enjoyed with the lands at the specified place for a long period of time, or by reason of the testator having dealt with them as one property, or of his having been in the habit of referring to them as forming one property under one distinguishing name (f). Where a testator devised his freehold property at M in trust for his two children and he had no freehold property there but had some at an adjoining place R in the same parish, held, in the absence of an expression of intention of the testator to devise property at R under the description of my freehold property at M the gift failed and there was intestacy (g). But under a devise of lands 'situated at or within D in the occupation of J the word *at* was held to mean lands adjacent to but not in the parish of D (h). Where a testator devised his farms situate in the parish of D now in the occupation of A and the farm consisted of two closes none of which was in the occupation of A, held, the entire farm passed under the plain and certain description of it in the will. The words 'now in the occupation of' 'following a description of the property have been held not an essential part of the description' (i), unless it appear from the context to have been intended to form a substantive part of the description (j). Where a testatrix devised her house and messuage lands, called H, 'situate in the parish of L containing by estimation eighty acres more or less now in the occupation of J C' and at the date of the will a farm of 175 acres, partly freehold and partly

(a) *Gallini v Noble* 3 Mer 691 see

Dobson v Waterman 3 Ves 308 n

(b) *Re Ofner*, (1909) 1 Ch 60

(c) *Re Gray* 36 Ch D 205

(d) *Re Lanc*, 14 Ch D 856, as to the difference between stock and debenture stock see *Allre v Hane* 9 Ch D 337

(e) *Haters v Wood*, 5 D G & S 717, *Muller v Woodside* 1r R 6 Eq 546, but see *Findlater v*

Lowe (1904) 1 Ir 519 J 1242-12 Ed

(f) *Homer v Homer* 8 Ch D 759 (see cases cited)

(g) *Barter v Wood* 4 Ch D 885

(h) *Homer v Homer* 8 Ch D 758

(i) *Good v d Trafford v Southern* 1 M. & S 299, *Re Willis* (1911) 2 Ch 563, *Re Horton*, (1920) 2 Ch 1 J 1235

(j) J 1235 7 Ed.

copyhold and of the latter a part in L and a part in an adjoining parish was in the occupation of J C *held*, the whole passed by the devise (a)

4. Gifts by implication Where a testator under a mistaken impression that his marriage settlement would yield his wife £1560 a year directed his trustees to add another £140 to the amount so as to raise his wife's jointure to £2000, it was held that the wife was entitled to such an annuity as will yield £2000 (b) So where by a codicil a testator bequeathed to A B £500 in addition to the £1500 already bequeathed to him, *held*, there was a valid gift of £2000 by implication (c) Parts of a description, which if the will contained no other devise to which they belonged would be rejected as *falsa demonstratio* sometimes derive a restrictive force from another devise in the same will with which they would otherwise stand in contradiction (d)

79 (S. 66) If a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be

When part of description may not be rejected as erroneous

considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 78 shall be deemed to have been struck out of the will

Illustrations

(a) A bequeaths to B my marsh lands lying in L and in the occupation of X' The testator had marsh lands lying in L some of which were in the occupation of X, and some not in the occupation of X The bequest will be considered as limited to such of the testator's marsh lands in L as were in the occupation of X

(a) A bequeaths to B 'my marsh lands lying in L and in the occupation of X, comprising 1 000 bighas of lands The testator had marsh lands lying in L some of which were in the occupation of X and some not in the occupation of X The measurement is wholly inapplicable to the marsh lands of either class or to the whole taken together The measurement will be considered as struck out of the will, and such of the testator's marsh lands lying in L as were in the occupation of X shall alone pass by the bequest

1 Change The words 'section 78 shall be deemed to have been' in the *Explanation* have been substituted for the words 'the 65th section are to be considered as'

(a) *Hillfield v Longdale* 1 Ch D 61
(other gifts also in the same will
wrongly devised)
Osney v Anstruther 10 Ves 453

459
(c) *Treor v Treor* 5 Russ 24; *Jordan v Forrester* 10 Ves 259
(d) J 1239 7 Ed

2. The section The section applies to the wills of Hindus &c. It sets certain limits to the operation of the rule laid down in the last section. The last section deals with a case where the description in its entirety is not applicable to any property left by a testator, and declares that if a part of the description sufficiently identifies the subject of a gift, the other part may be rejected. This section says that if there be any subject answering to the whole description as given by the testator in his will, then the legatee will be entitled to that thing alone and not to any other to which the description may be fitted by rejecting a part of it. The courts are not lightly to reject the words of a testator. "It is a well settled canon of construction that where a given subject is devised and there are found two species of properties, the one precisely corresponding to the description in the devise and the other not so completely answering thereto, the latter will be excluded, though had there been no other property on which the devise could have operated it might have been held to comprise the less appropriate subject" (a). Thus where the *ash pottis* held by the testator corresponded exactly with the description of the devise in the will, the *shami pottis* of which he was a co sharer and which lay in the same village were held not to pass (b). Under a devise "of all my copyhold estates situate in G and which I became entitled to on the decease of my father," copyholds situate in the same parish but surrendered by the father were held not to pass (c). In such cases Lord Bacon's maxim is applied, viz., "non accipidibent verba in demonstrationem falsam quae competunt in limitationem veram" i.e. where there is a subject matter to which all parts of the description apply, it is not possible to reject any of those terms as false description (d). The rule therefore is that if the testator leaves something answering to the description in the will the court will not extend its natural meaning.

In some English cases it has been laid down that where immovable property is devised by name, followed by a reference to occupation by somebody where such occupation does not form a substantive part of the description, the reference to occupation may be rejected if the whole of the property known by the name is not in the occupation of the person (e). But this rule has not been uniformly followed (f). Thus, where a testator gave "my residence called S House as are now occupied by me, held, the entire house did not pass and the words "as are now occupied by me" could not be rejected as *falsa demonstratio*, but only a part of the house passed which answered the whole of the description (g). The words of description are construed as words of limitation of the gift and therefore will pass only those properties to which they exactly apply (h). Similarly with regard to gifts of lands described by reference to the tenure under which they are

- (a) J 1243 7 Ed
 (b) *Tulsha v Mathura* 33 A 66
 (c) *Doe v Bell* 8 T. R 579
 (d) *Smith v Ridgway* 1 Exch 331 ;
 see *Webber v Stanley*, 16 C B
 N S 698 752 (leading case)
 (e) *Goodtitle v Southern* 1 M & S
 299, *Down v Down* 7 Taunt
 343
 (f) *Hardwick v Hardwick*, 16 Eq 168

- (g) *Re Seal* (1894) 1 Ch 316, see
 Homer v Homer 8 Ch D 758
 Pedley v Dodds 2 Eq 819
 Webber v Stanley, 16 C B N S
 (752)
 (h) *Morrell v Fisher* 4 Exch 591,
 604 cited in *Re Brockel* (1908)
 1 Ch 185 *Dawes v Miller* (1908)
 1 Ch 185, 190

held or to the interest of the testator therein (a). On the other hand, the words "in which I now reside" (b) or "now held by me" (c), have been held not to affect the general words of gift. Under this section however such rejection of part of the description is not possible.

3. Cases A gift of shares will not pass debentures if the testator has shares (d), or policies (e), of houses near S will not pass houses in G street (f), of leasehold property in C will not include other leaseholds in the same parish but at some distance from it (g). A gift of all the lands of the testator "situate at G in the occupation of S" will not include lands in the occupation of G (h). A gift of all dwelling houses at in or near S purchased of N has been held to pass four houses near S but not two which were 400 yards away (i), though in the absence of any property answering the description that in an adjacent place would have passed (j). Similarly, lands purchased of A did not pass such lands as were not so purchased (k), or lands at W purchased of S in the parish of C did not pass lands not at W though purchased of S and in the parish of C (l). Where fund or stock is converted in part then only the part not converted will pass under a gift of fund or stock (m).

4. Right of selection. Where a testator enumerated the properties he made over to trustees to pay the income to A for life and amongst the particulars enumerated were the words, "two houses in King Street, where in fact the testator had 3 houses, held, there was a gift of two houses only and the legatee was entitled to select (n).

80 (S. 67). Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Extrinsic evidence admissible in cases of patent ambiguity.

Illustrations.

(i) A man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary." It appears that there are two persons each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

- (a) *Doe v Brown* 11 East 441.
Quennell v Turner 13 Beav 240.
 see *Mathews v. Mathews* 4 Eq 278
 (b) *Re Willis*, (1911) 2 Ch 563
 (c) *Re Horton* (1920) 2 Ch 1
 (d) *Re Rodman* (1891) 3 Ch 135
 (e) *Water v Wood*, 5 D G & S 717
 (f) *Doe v Boy*, 3 B & Ad 453
 (g) *Attwater v Attwater* 18 Beav 311
 (h) *Hamer v Hamer* 8 Cl D 724
 See *Miles v Trevelyan* 8 Bing 244.

- Barber v Wood* 4 Ch D 835
 (i) *Doe v Roberts* 5 B & Ad 407.
Goodnight v Lamb v Pears 11 East 58.
Doe v Compton v Carpenter, 16 Q B 181 J 1247-8 7 Ed
 (k) *Care v Harris* 57 L J Ch 62
 (l) *Doe v Luford* 4 M & S 550
 (m) *Gillat v Gilliat* 28 Beav 451
 (n) *Topley v Eagleston* 12 Ch D 683.
Duckmanton v Duckmanton 5 H & N 219. *Natajanutemi v Peilathumti* 18 M 450

(ii) A, by his will, leaves to B "my estate called Sultanpur Khurd" It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended

1. **The section.** The section applies to the wills of Hindus *etc.* It lays down a rule for the admission of evidence of the testator's intention to explain ambiguities in a will where they do not arise from the words of the will but are created by evidence of circumstances admitted in the case. Where a will is certain on the face of it, but some uncertainty is introduced by parol evidence of the state of the testator's family, or other circumstances, that uncertainty may be removed by the admission of further evidence under this section (a).

The language of a will may be ambiguous or unambiguous. This section deals with the latter case. Where the words of a will are unambiguous extrinsic evidence cannot affect its construction and evidence is not admissible to show that the testator intended something different from what he has said (b); for the effect of admission of evidence will be to replace a will required by law to be in writing by the verbal statements of witnesses. Parol evidence therefore is not admissible to contradict the expressed terms of a will (c), unless the will contains an erroneous recital or statement of fact (d), nor is such evidence admissible to supply omissions in a will (e), nor to show that the testator intended to mean something different from what the words of the will in their common acceptation or primary import signify (f), unless there be no subject or object answering to the language used by the testator in which case evidence will be admissible (g). The language of the will is the language of the testator even when the will is drawn by somebody else (h).

Although therefore extrinsic evidence cannot affect the construction of a will where the words are unambiguous, yet recourse may be had to extrinsic evidence for the purpose of ascertaining the testator's meaning, e.g., where the court cannot tell exactly what is given or to whom it is given, because of obscure and doubtful expressions of the testator's will in regard to the particular conditions of his property (i). Now the admission of such extrinsic evidence may create an ambiguity. Such ambiguity, however, arises not from the words of the will but from the surrounding circumstances, for it arises after evidence has been admitted of those circumstances. Thus the uncertainty as regards the object or subject of

(a) *Clayton v Nugent* 13 M & Wels 200, 204

(b) *Ulrich v Litchfield*, 2 Atk 372, 374; *Parmiller v Parmiller*, 1 J & H 135.

(c) *Smith v Condon* 9 Ch D 170, *Re Aird's Estate*, 12 Ch D 291, *Re Boyd*, 63 L T. 92 J 461 7 Ed.

(d) *Re Taylor's Estate* 22 Ch D 495; *Re Kelsey* (1905) 2 Ch 465 J 460-1, 7 Ed. *Re Ofner* (1909) 1 Ch 60

(e) *Newburgh v Newburgh*, 5 Madd 364, *Langston v. Langston* 8 Bl (N S) 167, 2 Cl & F 194; see *Re Haygarth*, (1913) 2 Ch.

913 J 463 7 Ed

(f) *Shore v Wilson*, 9 Cl & F. 355, *Millard v Bailey* 1 Eq 378; *National Society &c v Scottish, &c* 1915 A C 207

(g) *Bemasconi v Atkinson*, 10 Hare 345, 348; *Re Hooper*, 88 L T. 160, *Doe v Brown*, 11 East 441, *Doe v Orenden* 3 Taunt 147.

(h) *Bemasconi v Atkinson*, 10 Hare (349); see *Rhodes v Rhodes* 7 A C (192) 199; *Parker v Felgate*, 8 P. D 171, *Re Dwyrell*, (1924) 2 Ch. 496

(i) *Higgins v Dawson* 1902 A C. 1, 60, 10 See S 75

the gift in the illustrations to the section arising from the fact that the testator has two cousins of the name of Mary or two estates of the name of Sultanpur Khurd is due not to the defective use of language by the testator but to extrinsic facts of which evidence has been given

2 Latent ambiguity Where the evidence given discloses the existence of more than one object or subject it is then that evidence of intention is admissible to show which of these applications was intended by testator (a) Ambiguity thus arising is called latent ambiguity or equivocation It is the incongruity or want of correspondence between the language and the facts which raises a latent ambiguity (b) A mistake (c) or surrounding facts (d) may create ambiguity But mistake in the name of a legatee committed by the writer of a will who was ignorant of the testator's family was not allowed to be corrected by admitting external evidence (e)

3 When extrinsic evidence is admissible The question as to the admissibility of evidence turns on this whether there is any latent ambiguity (f) The rule is clear if there be a patent ambiguity that is one which appears upon the will itself parol evidence cannot be admitted to explain it (g) but where there is a latent ambiguity that is where it seems certain enough upon the will but the ambiguity is raised by some extrinsic matter there parol evidence may be received in order to explain that which is made doubtful by parol (h) The rule that evidence of intention is not admissible has been clearly and plainly decided and expressed It is in cases of equivocation merely that such evidence is admissible (i) As has been observed by Lord Romilly M R, In every case of ambiguity whether latent or patent parol evidence is admissible to show the state of the testator's family or property but the cases in which parol evidence is admissible to show the persons intended to be designated (or property intended to be bequeathed) by the testator are those cases of latent ambiguity mentioned by Sir James Wigram where there are two or more persons who answer the description in the will each of whom standing alone would be entitled to take (j) The rule is thus set out in *Doe d Hincocks v Hincocks* (k) The rule is that evidence will be admissible when the words of a will are in themselves unambiguous but ambiguity has been raised by extrinsic evidence Where the meaning of the testator's words is neither ambiguous nor obscure where the devise is on the face of it perfect and intelligible but from some of the circumstances admitted in proof an ambiguity arises as to which of two or more things or which of two or more persons (each answering the words in the will) the testator intended to express parol evidence of the testator's intention is admissible In all other cases such evidence ought to be excluded Thus where there was a gift to George Gord the son of John Gord another to George Gord the

(a) *Doe v Hincocks* 3 M & W 363 369

(b) Wigram 134

(c) *Bristol v Bristol* 5 Bear 269
(d) *Lindgren v Lindgren* 15 L J Ch 429

(e) *Ruall v Hannam* 10 Bear 537

(f) *Chalet v Chalet* L R 711 1 361

(g) *National Society v Scottish National &c* 115 A C 207

(h) *Celso v Celso* Jac 451, 53 R R

42 cited in *Bayahat v Haridas* 40 B 1 9 271 C 946

(i) *Doe v Lyford* 4 M & S 350

(j) *Re Ingle's Trusts* 11 Eq 578

(k) *Higgins v Dawson* 1902 A C 110

McIntosh v McIntosh 511 L C 155 165, *Bayahat v Haridas*

40 B 1

(l) *Singer v Calder* 27 Bear 35

(m) 3 M & W 363 369

son of George Gord, and a third to George Gord the son of Gord, evidence of declarations of the testator was admitted with regard to the third gift to ascertain whom he intended to benefit (a)

Parol evidence is admissible where the gift is made to a person described as standing in a certain relationship *eg* 'to my nephew' (b) or to 'my grand daughter' (c), or their daughter (d) Where parol evidence is not forthcoming, the gift will fail for uncertainty (e) Parol evidence is also admissible where one part of a description applies to each of several persons and the other part to neither (f) 'A description may be equivocal which applies with legal certainty to each of the persons or things in question, though it may apply with greater propriety to one of them than to another Thus a devise to John Smith there being a John Smith and a John Thomas Smith has been held equivocal (g)

4 Where extrinsic is not admissible Such evidence is excluded (h) where the surrounding circumstances make it quite clear whom the testator had in his mind (i), or where the person can be ascertained by some definite rule of construction (j) or where the description as a whole is applicable to no person or thing but part of it applies to one and part to another (k), for extrinsic evidence is admissible where the description in all its parts is applicable to several subjects or objects (l) Accordingly where no part of the description applies to a particular person evidence of intention is not admissible (m), unless the description in the will was inserted by mistake (n) Similarly, 'a person to whom the terms of the description are imperfectly applicable may not, by parol evidence of facts tending to prove an intention in his favour, support his claim against another person exactly or more nearly answering to all the particulars of the description (o) There is no latent ambiguity where a legatee is once correctly described in one part of

- (a) *Gord v Needs* 2 M & Wels 129, see *Morgan v Morgan* 1 Cr & M 235, (declarations of the testator contemporaneous with the making of the will admitted) *Westlake v Westlake* 4 B & Ald 57 evidence is admissible to determine the objects of a gift where the testator has not expressed himself with reasonable certainty
- (b) *Phelan v Slattery* 19 L R Ir 177
- (c) *Re Hubbock* 1905 P 129 (evidence of intention admitted on the ground of blank) see *Delmare v Robello* 1 Ves 415
- (d) *Re Jeffrey* (1914) 1 Ch 375
- (e) *Hayter v Joinville* 3 East 172, see *Re Stephenson*, (1897) 1 Ch 75
- (f) *Still v Hoste* 6 Madd 192 *Price v Page* 4 Ves 679 *reld* to in *Doe v Hiscocks* 5 M & Wels 363, 370
- (g) *Bennett v Marshall* 2 K & J 740, *Let v Pan* 4 Hare 201, 249 sq, *Re Jeffrey* (1914) 1 Ch 375 *Re Clergy Society*, 2 K & J 615 (gift to an institution) *Haw*

- kins Construction of Wills* 3rd Ed p 18 19
- (h) See next section
- (i) *Jeffries v Mitchell* 20 Beav 15
- (j) *Coote v Boyd* 2 Bro C C (527) *Castledon v Turner* 3 Att 257, *Matthews v Foulsham* 11 L T 82 See *Re Mayo* (1901) 1 Ch 404 J 497 7 Ed
- (k) *Doe v Hiscocks* 5 M & Wels 363 see *Re Waller* 68 L J Ch 526
- (l) *Re Taylor* 34 Ch D 255 258 *Re Ray* (1916) 1 Ch 461
- (m) *Hampshire v Pierce* 2 Ves Sen 216 *Miller v Tracers* 8 Bng 244 *Barber v Wood* 4 Ch D 885 see *Re Mayo* (1901) 1 Ch 404
- (n) *Re Ofner* (1909) 1 Ch 60 *Re Waller* 68 L J Ch 526 J 506 7 7 Ed
- (o) J 503 *Delmare v Robello* 1 Ves. 412, *Re Peel* 2 P & D 46 *Holmes v Custance* 12 Ves. 279 *Wilson v Squire* 1 Y & C C C. 654 (gift to an institution), *Millard v Bailey* 1 Eq 378 *reld* to

the will and in another is referred to by name without any description and therefore no evidence is admissible to show that a different person was intended (a), or where a testator makes a bequest to his brother and then to his brother's son mentioning the name of both, evidence cannot be admitted to show that the son of the same name of another brother was intended (b). But where there are two persons named W M and W J. B M, both standing in the same degree of relationship to the testator both may be, regarded as W. M. and to remove this latent ambiguity evidence is admissible (c) Similarly, parol evidence for the purpose of showing that the testatrix was in the habit of treating her 74 shares in a Company as 37 double shares was held inadmissible (d) Where words are used which, according to general understanding of mankind have plain and definite meaning, they ought not, unless there be a controlling context, to be taken in any other meaning (e)

"Revoked clauses in a will cannot be referred to for the purpose of construing unambiguous parts of the testamentary disposition" (f).

5 **Wigram's rule VII** "Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined where the object of testator's bounty or the subject of the disposition (i.e. the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator"

6. **Declaration of testator** Where evidence of testator's intention is admissible, the evidence may be of oral declarations of the testator made before the making of the will and, in some cases, those made subsequent thereto are admissible (1) Declarations by the testator made before and after execution are admissible in evidence to show what are the constituent parts of the will (g) (2). Declarations made before or at the time of execution are admissible to rebut the presumption of alterations, interlineations etc. being made after execution (h) (3) Declarations made before or at the time of execution are admissible when there is equivocation with regard to the subject or the object of the gift which cannot be removed by the circumstances admitted in evidence (i) (4) Declarations by the testator made before or at the time of execution are admissible to prove the objects of testator's bounty and his intention to benefit them when there is an imputation of fraud in the making of the will (j)

- (a) *Webber v Corbett*, 16 Eq 515
 (b) *Doe v Westlake*, 4 B & Ald 57
 (c) *Bennell v Marshall*, 2 K & J 740
 (d) *Millard v Bailey*, 1 Eq 372
 (e) *Re Parker* 17 Ch D 262, *Millard v Bailey*, 1 Eq 372
 (f) *Choo Eng Wan v Choo Giong Tee* 1933 A. C. 469 *Hawkins*, 19 *Gould v Lake* 6 P D 11 *Re Hutchinson* 18 T. L. R. 706.

- (h) *Re Sykes* 3 P & D 26, *Dench v Dench* 2 P D 60.
 (i) *Doe v Morgan* 6 Barn & C 512, *Fleming v Fleming* 1 H & C 242. The rule has been cited in *Re Kilvert's Trusts* 7 Ch 170 173, *Charter v Charter*, L. R. 7 H L 364 370; *Charter v Auld*, (1931) 1 Ch 424 H 25 p. 614
 (j) *Doe v Palmer* 16 Q B 747 759

Extrinsic evidence inadmissible in case of patent ambiguity or deficiency

81. (S. 68). Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations

(i) A man has an aunt, Caroline, and a cousin, Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to 'my aunt Caroline' and 1,000 rupees to 'my cousin, Mary' and afterwards bequeaths 2,000 rupees to 'my before mentioned aunt, Mary.' There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by 'my before mentioned aunt, Mary.' The bequest is therefore void for uncertainty under section 89

(ii) A bequeaths 1,000 rupees to _____ leaving a blank for the name of the legatee Evidence is not admissible to show what name the testator intended to insert

(iii) A bequeaths to B _____ rupees, or "my estate of _____" Evidence is not admissible to show what sum or what estate the testator intended to insert

1. The section. The section is applicable to wills of Hindus, etc S 80 deals with the admission of evidence in case of latent ambiguity. This section lays down the rule that evidence cannot be admitted in case of patent ambiguity This section may be compared with S 93 of the Evidence Act, which, however, does not apply to the construction of a will

2. Patent and latent ambiguity. The distinction between patent and latent ambiguity is of ancient date Lord Bacon observes, 'There be two sorts of ambiguities of words, the one *ambiguitas patens*, and the other *latens* *Patens* is that which appears to be ambiguous upon the deed or instrument, *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed (or instrument) which breedeth the ambiguity' Patent ambiguity means an ambiguity inherent in the words and incapable of being removed 'either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence showing that expressions *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning' (a) Patent ambiguity arises where there is an obvious uncertainty of meaning though the language is intelligible (illust i), or, where the testator has not fully expressed himself, some words having been left out (illusts ii, & iii) A patent ambiguity therefore arises either from the defective use of language in the instrument or from the omission of something material and necessary to give operation to the instrument A written instrument is not patently ambiguous because an ignorant or uninformed person is unable to interpret it, but it is patently ambiguous where persons of competent skill and information are unable to interpret it (b) An instrument is also not ambiguous because it is difficult of construction (c)

(a) Starkie on Evidence, p 653
(b) Wigram. 130

(c) *Re Grainger*, (1900) 2 Ch 756.
764

3. **Ambiguity and inaccuracy.** Ambiguity further has to be distinguished from inaccuracy. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. Thus, if a testator having one leasehold house in one place, and no other house, were to give his freehold house there to A, the description though inaccurate would occasion no ambiguity. Extrinsic evidence is admissible to show whether the language is merely inaccurate with reference to the existing facts or really ambiguous. Therefore where there is patent ambiguity in a will, the will is really insensible or unintelligible because it points to no certain intention of the testator (a). Evidence is admissible where inaccuracy of the testator's language is patent, for the meaning may be perfectly unambiguous after the facts have been ascertained (b).

4. **Nature of evidence admissible in case of patent ambiguity.** 'Not only in case of inaccuracy but in case of ambiguity also extrinsic evidence must precede any declaration which a court can have a right to make that a will is ambiguous. The circumstances, that the inaccuracy is apparent upon the face of the instrument cannot in principle alter the case' (c). The evidence admissible in case of a patent ambiguity is evidence of collateral facts and circumstances or of usage in aid, explanation and interpretation of the instrument, so that the court may be placed as nearly as possible in the position of the testator. 'The courts have a right to ascertain all the facts which were known to the testator at the time he made his will or to place themselves in his position in order to ascertain whether there exists any person or thing to which the description can be reasonably and with sufficient certainty applied the presumption being that the testator intended some existing matter or person' (d). Evidence of surrounding circumstances therefore is admissible in such a case, for the words of a testator tacitly refer to the circumstances by which at the time of expressing himself he was surrounded.

5. **Parol evidence of intention.** In case of patent ambiguity evidence of intention is not admissible as in the case of latent ambiguity. The court cannot pass by the written will and make the intention of the testator—as an independent fact—the direct and immediate subject of proof (e). Evidence of intention is excluded in case of patent ambiguity because to define or supplement by parol evidence that which on the face of the will is left undefined or unexpressed would be to make a material addition to the written will (f). Accordingly where the words of a will are so defective or ambiguous as to be unmeaning no evidence can be given to show what the testator intended to say, because the intention is to be construed not by vague evidence independently of the expressions but by the expressions themselves.

Illustration (i) is an illustration of the well settled rule that parol evidence of intention is inadmissible unless the description in the will is applicable in all

(a) Wigram 135
(b) Wigram 134 See Ss 76-78
(c) Wigram 152.
(d) *Bernasconi v. Atkinson* 10 Hare 345.
Boyes v. Cook 14 Cl. D. 53.
Leake v. Parthasarathy 19 C. L. J. 367 380 P. C. *Chund v. Bal*
Samra 19 C. L. J. 363 P. C. *Do*

v. Hilscocks 5 M. & W. 363
Re O'neer (1929) 1 Ch. 60
Rice v. Bear & Co. v. Adamson 2 A. C.
743 764, *Re Skilken* (1916) 1 Ch.
518.

(e) Wigram 66
(f) *Re Helles* (1902) 2 Ch. 876 (see
cases cited in argument)

its parts to more than one person : *e.g.*, there is equivocation. It is therefore excluded where part of the description applies to one person and part to another (a). Thus, where a testator gave some property to his son J H for life and on his death to J H's eldest son J H and the eldest son of J H, was named Simon but he had an eldest son by a second wife named J H, *hell* evidence of instructions given by the testator for the preparation of his will and of his declarations after its execution were not admissible (b). Evidence of the testatrix's expression of intention before and after the making of the will is not admissible. Such evidence of intention is only admissible where the words are equally applicable to two or more persons, which is not the case here where the words are not strictly applicable to any person. But evidence of the surrounding circumstances and of the knowledge of the testatrix is admissible (c).

6. **Blanks.** The rule as to the admission of evidence where there are blanks in a will is thus summed up (d) — "A complete blank cannot be filled up by parol testimony however strong. Thus a legacy to Mr. cannot have any effect given to it (e), nor a legacy to Lady (f). But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to in order to show what that meaning is. Thus a legacy to a person described by an initial, as to Mrs C, admits of explanation as by shewing that the testator was accustomed to speak of a particular person by the initial of her name (g). And where a blank was left for the Christian name, parol evidence has been admitted to shew who was intended (h).

7. **Secret trust.** There is no ambiguity or deficiency on the face of a will under this section where a secret trust is created, *e.g.*, where a testator instructs his trustees to pay one of them a sum of money to be transferred by him to a person whose name the trustee will disclose (i).

82 (69). The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Meaning of clause to be collected from entire will

Illustrations

(1) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(a) *Charter v Charter* L. R. 7 H. L. 364
377 *Re Ray* (1916) 1 Ch 461,
465, see *Re Jeffrey* (1914) 1 Ch
375

(b) *Doe v Hiscocks* 5 M. & W.
363

(c) *Re Taylor* 34 Ch. D. 255. Such
evidence is admissible under S. 75.
See *Re Waller* 68 L. J. Ch. 526
Reynolds v Whelan 16 L. J. Ch.
434

(d) *Re De Rosaz* 2 P. D. 66, 68.

(e) *Baylis v Alt* Genl. 2 Atk. 239.

(f) *Hunt v Holt* 3 Bro. C. C. 311.

(g) *Abbot v Massie* 3 Ves. 148.

Clayton v Lord Nugent 13 M. &
W. 200, 207.

(h) *Price v Page* 4 Ves. 680. see
Sullivan v Sullivan 1 R. 4 Eq.
457.

(i) *Bayabal v Haridas* 40 B. 1.

(ii) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first as if he had said 'I give Black Acre to B, and all the rest of my estate to A'

1. **Change** The words "and for this purpose a codicil is to be considered as part of the will being the concluding words of S 69 have been left out from the section

2. **The section.** The section is applicable to the wills of Hindus *etc*

3 **The rule** It is the ordinary rule of construction of every document, namely, that the whole of document must be looked at and if possible the words read according to their natural and reasonable meaning 'One must read the whole instrument as well as one can and conclude what really its effect is intended to be by looking at the instrument as a whole (a) In the *Tagore* case (b) the rule has been thus laid down The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with the law or not the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitation therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred' All the words of a will must be taken together without any one being insisted upon to the exclusion of others' (c)

4 **The meaning to be collected from the entire instrument.** The intention is to be gathered by looking at the whole of the provisions of a will, and not from particular expressions or detached passages alone (d) It is the duty of the court to endeavour to discover from the whole the real meaning of the testator, and, if possible to reconcile all its parts' (e) The court in construing a will must give effect to all the words of a will and may in so construing create an estate by implication when there is not in so many words a clear and absolute gift (f)

5 **All its parts to be construed in reference to each other** The primary rule of construing a document in the nature of a will is that the meaning of any clause in it is to be collected from the entire instrument and all its parts are to be construed with reference to each other (g) Importance is not to be attached to isolated expressions but the court must look to all the clauses of the will, and give effect to all of them ignoring none as contradictory or redundant (h) It does not follow, however that in every case it is the duty of the court to reconcile several clauses in a will, for they may be antagonistic to each other, *e.g.*

- (a) *Inderwick v Tatchell*, 1933 A C 120, *Kal das v Kanhyala* 11 I A 218 11 C 129, *Dintarini v Krishna Gopal* 36 C 149, 156. *Gulraj v Ramlal* 49 B 478, 95 I C 279
(b) 9 B L R 377 409, 18 W R 359
(c) *Mohamed Shamsul v Shewkrum* 21 A 715 22 W R 409, see *Ram Lal v S of S for Inda* 8 I A 46, 7 C 304
Imay v Monohari 11 C. 654

- P C *Ramdhan v Manibal* 25 B 429, *Egerton v Brownlow* 411 L C 1161
(e) *Brocklebank v Johnson* 20 Beav 205 213
(f) *Hara Kumari v Mohini* 7 C L J 540, see *Anandsoo v Adm Genl* 20 B 450
(g) *Amirthayyan v Katharamayyan* 14 M 65 See S 65 note
(h) *Shb v Tarangini* 8 C L J 20
Kandarpa v Jendra 12 C L J 391

where the testator intended to provide for two different circumstances (a). Where a testator made somewhat inconsistent dispositions the court observed, "We are to try to get at the intention by looking at the whole will and ascertaining the sense in which each word is used by the testator according to its collocation in the will" (b). The general rule no doubt is that one should not construe an instrument in such manner that one part would contradict the other part without unduly straining the language and in conformity with the intention of the testator (c).

Where there is ambiguity, the sense of one part may be ascertained from the others. Where the words are clear, there is no occasion to go beyond them and attempt to speculate as regards the testator's possible intention (d). Where the terms of a gift were capable of being construed either as a gift of an absolute interest or of a life estate, it was held by reference to the other clauses of the will that a life-estate only was intended (e). The court cannot confine its attention to one clause in a will and separate from it other passages in the will even though the effect of the latter be to make the whole gift void (f).

6. A codicil to be considered part of the will. In order to ascertain the intention of the testator, the will and the codicil are to be read a whole (g). It is the general intention gathered from the will and the codicil together that is to prevail (h). The will and the codicil being all one testament, the language of the will may be interpreted by that of the codicil (i). Ambiguities in a will may be cleared up by reference to the codicil (j). But if there be an obviously erroneous recital of the will in the codicil, that will not alter the construction of the will (k).

7. Where there are several wills. Where there are several wills every endeavour should be made "to preserve either wholly or in part the contents of the prior document" (l). A qualification has been added to this proposition (m), namely, that this attempt should not be made unless the rejection of the prior document would lead to partial intestacy. If the subsequent testament be styled a codicil, the intention of the testator must be taken to be that the will and the codicil should stand together (n).

(a) *Damodaradas v. Dayabhai*, 25 I. A. 126, 136, 22 B. 833, on app. from 21 B. 1.

(b) *Jenkins v. Hughes*, 8 H. L. C. 571.

(c) *Re Bedson's Trusts*, 28 Ch. D. 523; *Taylor v. Starrock*, 1900 A. C. 225, 232, 233.

(d) *Livesey v. Livesey*, 2 H. L. C. 419.

(e) *Samasundara v. Ganga*, 28 M. 386.

(f) *Lalit v. Chukkun*, 24 I. A. 76, on app. from 20 C. (933-9).

(g) *Chukkun v. Lalit*, 20 C. 906, 937; *Hartley v. Tribber*, 16 Beav. 510; *Re Bates* 1925 Ch. 157.

(h) *Adm. Genl. v. White*, 13 M. 379; see *Wilson v. Oakes*, 31 M. 283.

(i) *Darley v. Martin*, 13 C. B. 683, 693; *Hartley v. Tribber*, 16 Beav. 510.

(j) *Grocer v. Raper*, 5 W. R. 134; *Re Venn*, (1904) 2 Ch. 52.

(k) *Skerratt v. Oakley*, 7 T. R. 492, 4 R. R. 504.

(l) *Weld v. Acton*, 2 Eq. Ca. Abr. 777, 22 E. R. 661.

(m) *Freeman v. Freeman*, Kay 479.

(n) *Re Howard*, 1 P. & D. 636; *Panakkal v. Elachar*, 41 I. C. 556, 560, 1917 M. W. N. 645.

83 (S. 70). General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

Illustrations.

(i). A testator gives to A 'my farm in the occupation of B,' and to C "all my marsh-lands in L." Part of the farm in the occupation of B consists of marsh-lands in L, and the testator also has other marsh lands in L. The general words, "all my marsh lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh-lands in L.

(ii). The testator (a sailor on ship board) bequeathed to his mother his gold ring, buttons and chest of clothes and to his friend, A (a shipmate), his red box, clasp knife and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

(iii). A, by his will, bequeathed to B all his household furniture, plate linen, china, books, pictures and all other goods of whatever kind, and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

1. The section. The section applies to the wills of Hindus, etc.

2. The rule. The rule laid down in this section is not restricted in its operation to wills alone. It has been applied to the interpretation of statutes and in that connection the rule has been thus stated—"When two or more words, susceptible of analogous meaning, are coupled together, *nascuntur a sociis* (they are known by the company they keep) they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is the more general is restricted to a sense analogous to the less general" (a). It is a general rule of construction that, where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words are treated as referring to matters *ejusdem generis* with such class (b). Language is flexible and words instead of being always taken in a literal sense are given sometimes an enlarged and sometimes a restricted meaning in accordance with the expressed intention of the testator.

In applying this rule, however it will be well to remember the observation of the Privy Council 'that clear and unambiguous dispositive words are not to be

(a) Maxwell Interpretation of Statutes
6 Ed. 574

(b) *Lynton v. Trenchard* 3 H & W.
51

controlled or qualified by any general expression of intention" (a). The rule has been applied to descriptions of persons and things as well as to descriptions of donees and of property (b). A gift of 'all the rest' after gifts of house and garden and several pecuniary legacies was held to include realty as well as personality (c), a gift of shares in a railway company was held to pass the testator's stock in that railway (d). Where a testator by his will gave his wife power to adopt a boy "from the children that may be born in the families of my brothers" and added, "the principal object of the will is that you should adopt for me any suitable boy," the court held that the general words 'any suitable boy' are to be understood in a restricted sense because the testator's intention was to limit the selection to a boy born in his father's families and there was no indication of a change of mind (e).

3. Illust (ii) This illustration seems to be based on the decision in *Cook v Oakley* (f)

4. Illust (iii). This illustration may be compared with the facts in *Wrench v. Juttig* (g), where a testator bequeathed all his "household furniture, plate, linen, books, china, pictures and all other goods of whatever kind" and also gave him "3 to 4000 l or whatever remaining sum or sums" held, that the words 'all other goods' cannot have an enlarged meaning because the testator did not intend all his estate to pass to A nor did the general residue pass to A. The general rule in such a case has been thus stated: A 'general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words or, in other words as comprehending only things of the same kind as those designated by them, unless of course there be something to show that a wider sense was intended' (h). One word followed by general words will not have the effect of restricting the meaning of the latter (i).

A general word will be understood in this restricted sense only where it appears to be the meaning ascribed to the word by the testator in his will as stated in the section. Thus where a testator gave to A "all mortgages, ground rents, judgments, etc, whatever I have or shall leave at my death, as plate, jewels, linen, household goods, coach and horses, for her use," held that goldsmith's notes and bankbills were not included in the general words 'whatever I have or shall have, as the testator himself has specified the sense in which these words are to be understood (j).

- (a) *Lalit v Chukhun*, 24 C. 834, 846, see *Krishnarao v Benabai* 20 B 571, 591, *Indar v Jalpal*, 15 C 725, *Bramamayi v Jogesh* 8 B L R 400, *Rameshar v. Arjun*, 23 I A 194
 (b) H 28 p 682 f n (a) referring to *Edwards v Thompson*, 38 L J Ch 65, *Lamonby v Carter*, (1903) 1 Ch 352, *Tennant v Stanley*, (1906) 1 Ch 131
 (c) *Altree v Altree*, 11 Eq 280
 (d) *Morice v Aylmer*, L R 7 H L 717
 (e) *Amrithayyan v Ramayyan*, 14 M 65

- (f) 1 P W 302, see also *Porter v Tournay*, 3 Ves 311, *Hunt v Hort*, 3 Bro C C 311
 (g) 3 Beav 521
 (h) Maxwell p 291, *Doggett v Catlens*, 34 L J C P 159, *Thwaites v Coulthwaite*, 65 L J Ch 238
 (i) *Swinfen v Swinfen*, No 4, 29 Beav 207
 (j) *Timewell v Perkins*, 2 Atk 102, *Rawlings v Jennings* 13 Ves 39, commented on in *Parker v Merchant*, 1 Y & C. C. (304), *Woolcomb v Woolcomb*, 3 P W 111, *Wilde v Holtzmeier*, 5 Ves 811.

There is a further limitation to the application of this rule, viz., "the general principle in question applies only where the specific words are all of the same nature. Where they are of different general, the meaning of the general words remains unaffected by its connection with them" (a). In other cases again a list of enumerated articles instead of restricting the sense of general words has been treated as words of enlargement (b).

5. Cases where general words were not understood in a restricted sense owing to the absence of such intention in the will :—

(i). *Effects* The word will include whole personalty (c), but will not *prima facie* pass realty (d). A gift of effects following an enumeration of chattels personal will be restricted to things *ejusdem generis* as those described by the preceding words (e).

(ii). *Property* Property in England will include money in the funds, debts owing in England, arrears of pension and the like (f), a gift of property in a foreign country will pass simple contract and specialty debts owing by the person living there (g). The term has also been construed to mean the whole residue (h).

(iii). *Money* This term has been held to include stock (i) but not stock in the funds (j), to include moneys due on securities or otherwise (k), or money which the testator at the time of his death could have claimed immediate payment (l), to include the whole of the residuary estate of the testator (m), the entire personal estate (n). Evidence has been held admissible to show that under the words 'ready money' a testator intended shares in an Insurance Co to pass (o). A gift of 'all the rest of my moneys' was held to mean cash only and not notes, bonds or mortgages (p).

(iv). *Malik*. The word *malik* literally means an owner and therefore would confer an absolute estate, but the sense may be modified by the words in the context. In other words, the context may qualify or cut down the full proprietary rights that the word *prima facie* imports (q).

84. (S. 71). Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

Which of two possible constructions preferred.

- (a) *Maxwell*, p. 596
 (b) *Fisher v Hefburn*, 14 Beav 626.
Cambridge v Rous, 8 Ves 12.
Dean v Gibson, 3 Eq 713, 717.
 (c) *Campbell v. Prescott*, 15 Ves 500
 (d) *Doe v Earles*, 15 M W. 450 but see
Verlannes v Robinson, 53 M L J 71
 (e) *Northey v Paxton*, 60 L T 30.
Manlon v Tabor, 30 Ch D. 92
 (f) *Arnold v Arnold*, 2 M & K 365
 (g) *Tyrone v Waterford*, 1 D F. & J
 613; *Guthrie v Walmond*, 22 Ch
 D 573; *McKecknie v Clark*, (1904)
 1 Ch 294 S R 237
 (h) *Kendall v Kendall*, 4 Russ 569
 (i) *Dewson v Gaskoin*, 2 Keen, 14;
Newman v Newman, 26 Beav 218
 (j) *Hotham v Surton*, 15 Ves 319.
Gasden v Datterell, 1 M & K

- 56, *Ommaney v Butcher* T. & R
 260, *Collins v Collins*, 12 Eq 455
 (k) *Langdale v Whitfield* 4 K & J
 426
 (l) *Byrom v Brandreth*, 16 Eq 475
 (m) *Re Skillen* (1916) 1 Ch 518;
Rogers v Thomas, 2 Keen 14
 (n) *Cheda Lal v Gobind Ram*, 30 A
 455, 5 A L J 519
 (o) *Knight v Knight* 30 L J Ch 664
 (p) *Mann v Mann*, 1 Joh Ch 231
 S R 235 7.
 (q) *Sulochana v Jagatlatni*, 30 C. L. J
 51 (see cases cited), *Saraf v Rati*
Nath 30 A 84 P. C.; *Sures v*
Lalli, 22 C. L. J 316 (mitaya's
malik held to mean an absolute
 owner)

The section. The section is applicable to the wills of Hindus, *etc.* It applies where inconsistencies are found in one and the same provision or clause and is thus distinguished from the rule (a) which states that "if there be a repugnancy, the first words in a deed, and the last word in a will, shall prevail" (b)

The rule. The rule says that if a clause is capable of two constructions, one of which will render it void the other of which will render it reconcilable with all the previously expressed intentions of the testator, there can be no doubt that the former construction is to be adopted (c). Where it is possible to put a reasonable construction upon a will which results in a testacy that construction must prevail rather than one which leads to an intestacy (d). Therefore where there are two modes of construing an instrument, the one of which preserves and the other destroys, it is the rule of law and of equity following the law in this respect, that the Court should rather lean towards the construction which preserves rather than destroys (e). Thus where a Hindu gave his two widows power to adopt in terms which were capable of two constructions, *viz.*, both simultaneous and successive adoptions by the widows, the court adopted the latter construction because it considered "that the person giving authority intended his widows to do that which the law allowed" (f). Before ascribing an intention to the maker of an instrument which is contrary to law the court must be satisfied "that the instrument does not fairly admit of being construed in a sense which the law will give effect" (g).

On a similar principle where there is something like ambiguity and so two constructions are open, the more reasonable of the two is to be adopted (h), so also a construction which avoids contradiction is to be preferred (i), but where the language is clear and there is no inconsistency or contradiction the clear words will prevail (j).

Where by acting on one interpretation of the words the court is driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, then if the language admits of two constructions, the court may reasonably and properly adopt that which avoids such an anomaly, even though the construction adopted is not the most grammatically accurate (k). But where the testator has clearly expressed a capricious gift, the court cannot control the clear expression of opinion (l).

- (a) *Doe v Biggs*, 2 Taunt 109
 (b) *Adc Genl v Hormusji*, 29 B 375
 (c) *Martelli v Holloway* L. R. 5 H L. 532 548, *Re Sanford*, (1931) 1 Ch 939 943, *Payne v Gray*, (1912) 1 Ch 343, 365
 (d) *Mandakini v Arunkala* 3 C. L. J 515, 520, *Re Harrison* 32 Ch D 393 *reld to*; *Paparat v Chahermal*, 1141 C 105
 (e) *Langston v Langston* 2 Cl & F 194, 243 cited in *Adc Genl v Hormusji* 29 B 375, and in *Adc Genl v Karmaji* 6 Bom L. R. 601 *Shiam Sandar v Jagannath* 30 Bom. L. R. 110, 54 M. L. J 43
 (f) *Akhoa v Kalapalar* 121 A 194, 12 C. 476

- (g) *Bhoobun v Harish* 51 A 138, 4 C. 23, *Lalit v Chakkun* 24 C 834
 (h) *Johnson v Crook*, 12 Ch D 637, *Bathurst v Errington*, 2 A. C. 693
 (i) *Amlithayyan v Ketharamayyan*, 14 M. 65
 (j) *Bachman v Bachman*, 6 A 553, 4 A. W. N 194, citing *W'li'man v Aiken*, 2 Eq 414
 (k) *Abd'ul v Mift'ison*, 7 H L. C. 69 67 cited in *Indar v Jaipal*, 151 A. 127, 15 C. 725, *Bakant v Errington* 2 A. C. 694
 (l) *Johnson v Crook* 12 Ch D 637 cited in *Bachman v Bachman*, 6 A 553, 4 A. W. N 194

It is clear the leaning of the courts is to adopt that construction, where the words of the will admit of more than one construction, which renders the testator's intention reasonable and consistent with the law, in other words, that construction which will render the will good (a).

No part rejected,
if it can be reason-
ably construed

85. (S. 72). No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

The section. The section is applicable to the wills of Hindus *etc.* The courts are not to interfere lightly with the words of a testator for their duty is to construe a will and not to make a will on behalf of the testator. The rule laid down in the section should only be applied in the last resort (b). Thus in the case of a will of an illiterate person, Lord Campbell has observed that the rules of grammar and the usual meaning of technical language might be disregarded in construing the will, but no word could be struck out from the will which, standing where it is, has a clear and definite operation in the disposal of his property (c). In a case in which the argument on one side rested chiefly on the inconsistency of giving to the same person in the same sentence an estate for life and an estate in fee, the court observed there was certainly a peculiarity in that, but the devise, as it stood, was not so insensible or contradictory as to drive the court to the necessity of expunging or adding words to give it a meaning (d). "It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part words inconsistent with the former, that the first words are to be cancelled or overthrown" (e); but effect is to be given to the general intention of the testator (f), thus modifying the particular intent which is inconsistent with the former (g). All parts of the will are to be construed with reference to each other (h). And the court will adopt that construction which will give effect to every word of the will and not reduce some of the expressions to silence. But words which are wholly inconsistent with the tenor of the will, incongruous with the context, or irreconcilable with the intention of testator, cannot stand. Thus the words, 'no child or children' (i), 'living at the death or second marriage of my wife' (j), or 'for their lives' (k), have been rejected. "The rule is that words are not to be rejected unless you cannot by any possibility give them a rational construction" (l).

- (a) *Atkinson v Hutchinson* 3 P. W. 259 W. 692, 12 Ed. J. 1162, 7 Ed.
(b) *Gulabji v Rastomji*, 49 B. 478, 95 I. C. 229, 233
(c) *Hall v Warren* 9 H. L. C. 420
(d) *Chambers v Bratford* 18 Ves. 369
and on app. 19 Ves. 652, *Largley v Thomas* 6 D. M. & G. 645, *Cole Wade* 16 Ves. 27, *Krishnarao v Benabai* 20 B. 571, 591.
(e) See S. 63 *Jenson v Wright*, 2 Bl. 1, 56

- (f) W. 687
(g) *Towns Wentworth*, 11 Moo. P. C. 526, cited in *Mellor v Dalniece*, 33 Ch. D. 193, 206
(h) *Re Bedson's Trusts* 28 Ch. D. 523, 525. See S. 82 p. 35.
(i) *Boon v Cornforth* 2 Ves. Sen. 277
(j) *Smith v Crabtree* 6 Ch. D. 591
(k) *Doe v Stenlake* 12 East 515
(l) *Chambers v Bratford* 19 Ves. 652, *Sherratt v Bentley*, 2 My. & K. 149, *Constantine v Constantine* 6 Ves. 100

Interpretation
of words repeated
in different parts of
will.

86 (S. 73). If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

The section. It applies to the wills of Hindus, etc.

The rule In *Ridgeway v. Munkittrick* (a), Lord Sugden observed, "It is a well settled rule of construction, and one to which from its soundness I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftner in the same instrument, unless there appear a clear intention to the contrary." This dictum has been characterised as having been "asserted perhaps too positively as a general rule of construction" (b). Nevertheless, it has been regarded as a sound rule of construction. Thus it has been laid down (c).—"It is a canon of construction that where the testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all parts of his, if it do not violate the sense" Lord Lindley, M. R. observes.—"I do not know whether it is law or a canon of construction, but it is good sense to say that whenever in a deed, or will, or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing when, used in another part of the document, its meaning is not clear." Thus, the word issue was taken to have been intended to mean children in a particular context where the meaning was uncertain because it was used in that sense in other places in the will "The way to interpret a will of this kind is to look at it and ascertain what the testator meant and then see whether there is any established canon of construction which prevents the court from giving effect to that construction" (d). Where a testator said that if a son be born to him he should be the owner of the residue and if no son be born, then his wife should be the owner, it was held that the term 'owner' was used in the same sense in both places (e). A term is deemed to be used in the same sense in a will and a codicil attached to it, because "the will and the codicil are to be construed together as one instrument conveying the meaning of one man" (f)

Contrary intention. Words will not have the same meaning when there is a "very strong indication to the contrary on the face of the will" (g). Accordingly, the word 'issue' has been held not to have been used in the same sense in various clauses in the same will (h). Where words in a will have acquired a special meaning by reason of their context, that meaning cannot safely be given to them when used in a different context (i). The word 'malik' ordinarily implies absolute ownership (j).

- (a) 1 Dr & W 84, fold in *Endyean v Archer*, 1903 A C 379 which again is fold in *Aghore v Kamini*, 11 C L J 461, 473
(b) *Re Brooke*, 1903 A C 379
(c) *Rhodes v Rhodes*, 27 Beav 413
(d) *Re Birks*, *Kenyon v Birks*, (1900) 1 Ch 417; *Krishnarao v Benabai*, 20 B 571.
(e) *Jaiaram v Kessowjee*, 4 Bom L R 555

- (f) *Re Buckle*, (1894) 1 Ch. 286
(g) *Harcey v. Harcey*, 32 Beav 441
(h) *Re Brooke* 1903 A C. 379 (settlement), *Dalzell v Welch*, 2 Sim 319, 29 R R 110, *Re Warren's Trust* 26 Ch D 208
(i) *Ballin v Ballin*, 7 C 218 224, *Carler v Bentall*, 2 Beav 551
(j) *Surjiamoni v Rabi Nath*, 35 I A 17; 30 A 84

but it has also been sometimes used to denote limited ownership (a), and in one will as applied to the widow it was held to confer a life estate and as applied to the adopted son to indicate absolute ownership (b) In England the distinction that prevails between real and personal property (not recognised in this country) has sometimes led courts to put different constructions on the same words in the same will (c)

Testator's intention to be effectuated as far as possible 87 (S. 74). The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration

The testator by a will made on his death bed bequeathed all his property to C D for life and after his decease to a certain hospital The intention of the testator cannot take effect to its full extent because the gift to the hospital is void under section 118 but it will take effect so far as regards the gift to C D

Change The words 'shall not' have been substituted for the words 'is not to be'

The section The section applies to wills of Hindus etc

The rule The rule laid down in the section says that where effect cannot be given to the intention of the testator to the full extent partial effect may be given to it (d), because the court is bound to give effect to the intention of the testator as far as that can be ascertained and put a meaning upon the will however inaccurate it may be (e) The reason is that when a testator executed a will in solemn form the court must assume that the testator did not intend to make it a solemn farce, that he did not intend to die intestate when he had gone through the form of making a will, therefore the court should read a will so as to lead to a testacy and not to an intestacy (f) Thus where a gift was good in itself, but was followed by an unlawful or repugnant condition or qualification in a distinct clause, the gift was upheld and the condition or qualification which alone was obnoxious was rejected (g) Where there was an out and out gift to the rectors and churchwardens of a parish subject to the proviso that they should spend a part of the income for a certain purpose which was void held the gift to the rectors did not fail by reason of its being a bequest of a residue after a void bequest (h) In a similar case Jessel M R observed that his opinion untrammelled

- (a) *Lal v Chakkun* 24 C. 834 on app from 20 C. 936
 (b) *Punchoo v Trylucko* 10 C. 342, similarly *pura pauradi kram* means an estate of inheritance *Lal v Chakkun* 24 C. 834 but may mean a gift to the male issue only, *Bugola v Bhawanee* 5 W. R. 119
 (c) *Exp Hinch* 5 D G M & G 189 see *Rose v Rose* (1897) 111 9 58

- (d) *Southey v Somerville* 13 Ves. 496
 (e) *Thellusson v Woodford* 4 Ves 227 326
 (f) *Re Harrison* 30 Ch D 373 (where a blank was construed by reference to a draft will)
 (g) *Egerton v Brownlow* 4 H L C 1011 see S. 135
 (h) *Luk v Att Genl*, 4 Eq 521 (see cases discussed *Re Williams* 5 Ch D 735)

by authority was that the whole gift was void because the contingent surplus could not be ascertained, but the weight of authorities was clearly against his opinion and effect was given to the will so far as it was not void (a). In Hindu law an estate tail cannot be created but the validity of a life estate preceding such invalid disposition is not affected thereby (b)

The question whether the testator's intention is consistent with the rules of law or not, i.e., can be given effect to or not, can never arise till it is settled what the intention is. Where the words are clear the construction cannot be altered to something different from the plain meaning for the purpose of escaping the harsh consequences of rules of law (c)

The last of two inconsistent clauses prevails

88. (75). Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations

(i) The testator by the first clause of his will leaves his estate of Ramnagar to A, and by the last clause of his will leaves it 'to B and not to A' B will have it

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail

The section The section applies to the wills of Hindus, etc. The rule that where there are two inconsistent clauses the latter shall prevail has been called by Jessel, M R, as 'the rule of thumb' (d). It is only in cases where two clauses in a will are so absolutely irreconcilable that they cannot possibly stand together that the latter of the two can be allowed to prevail, the theory being that the testator may have changed his mind (e). Where a will was made in a printed form with additions in handwriting the earlier gift in writing prevailed (f). Provisions in a codicil, so far as they are inconsistent with those of a prior will, have the effect of revoking the will (g). The reason of the rule is that the context fails to supply a clue as to the intention of the testator and both gifts or clauses have to be rejected. In order to avoid this, the rule of construction laid down in this section has been adopted

Cannot possibly stand together. There are certain well known exceptions to the rule which are perhaps implied by the term 'possibly' which denotes that

- (a) *Re Birkett*, 9 Ch D 576
- (b) *Krisnamoney v Narendro*, 16 I A. 29, 16 C. 383. *Tagore Case* 9 B L R 377. *Cally Nath v Chunder Nath*, 8 C 378. *Rameshwar v Lachmi*, 7 C. W. N 688 but see *Shookmoy v Menohari*, 7 C. 269, 11 C. 644
- (c) See *Vallabhdas v Thacker* 14 B 360. *Sures v Lalit*, 22 C L J 316, 20 C. W. N 463, 471. *Madura Fund v Ramakshi*, 50 M L J 355, 94 L C. 487

- (d) *Re Bywater* 18 Ch. D 17 see *Doe v Biggs*, 2 Taunt. 109 cited under S 84
- (e) *Amirthayyan v Ketharamayyan* 14 M 65, *Ioling Ulrich v Litchfield* 2 Atk 372. *Constantine v Constantine* 6 Ves. 110. *Ado Genl v Hornum* 29 B 375. *Somasundara v Ganga*, 28 M. 386
- (f) *Re Lupton*, 1905 P 321
- (g) *Re Hough v Will* 20 L. J. Ch 422. *Babers v Potter* 10 Ch. D 733

the section is not to be applied except on the failure of every attempt to give the whole will such a construction as will render every part of it effectual (a) Therefore, a bequest by implication in a later clause is not sufficient to revoke a bequest made in express and distinct words There must be express contradiction between two clauses in a will Where there is an express, unqualified and absolute bequest, there must be in a subsequent part of the will a distinct and positive revocation of that in order to enable the court to deprive the legatee to whom it is first given of his gift (b) It has been said that where two clauses in a will are irreconcilable the gift in the later clause will prevail, if it is found that the testator did not intend the prior gift to take effect according to the terms (c) Where therefore there is a clear gift followed by another inconsistent with it but not so clear in its terms, the latter will not prevail (d) Where the subsequent directions are clear the prior absolute gifts have been cut down to smaller estates (e)

Sometimes gifts which are irreconcilable have been reconciled by giving effect to the general intent of the testator, thus modifying the particular intent which is inconsistent with the former (f)

The rule is not to be applied in case of mere inconsistency, but the court is to try to discover the meaning of the testator from the whole will, and, if possible reconcile all its parts (g), thus a gift to A in fee and later on a gift of the same property to B for life has been construed as a life estate in favour of B with a remainder in fee simple in favour of A (h), so also where the same estate was devised to more than one person in fee the gift was held to be a joint one (i)

Where the section does not apply. In case of an inconsistency between a gift and a direction following it as to how the gift is to be enjoyed or paid it has been held that the gift shall prevail and the direction is to be ignored (j) The same rule applies in this country though not coming within the words of the section for this section applies in case of inconsistency between two gifts (k) It has been said that where the particular intention of the testator is opposed to the policy of law, it may be disregarded and not allowed to affect the general intention to benefit somebody which must therefore prevail (l). The rule laid down in this section has no operation where the inconsistency is found in one and the same provision (m) The inconsistent provisions must refer to the same subject

- (a) *Amlithayyan v Ketharamayyan* 14 M 65, *Gulbaji Rustomji*, 49 B 478
 (b) *Kerr v Clifton* 8 Eq 462, *Soorjee money v Denobundoo* 6 M 1 A 526, 552.
 (c) *Satyaranjan v Annapurna* 48 C L J 523, 114 1 C 656
 (d) *Bechar v De Cruz* 19 B 770, *Daru v Benrel* 30 Bear 226, *Brulow v Masfeldt* 52 L J Ch 27, *Re Isaac* (1905) 1 Ch 427
 (e) *Bibens v Potter* 10 Ch D 733 (see cases cited); *Re Hankury* 1905 A C 64 (see *Corbell v Corbell* 14 P D 7)
 (f) See *Shookmay v Monohari*, 7 C 269, 253, see *Jeson v Wright*

- 2 Bl 1 49, 56 57 (where this distinction has been condemned.)
 (g) *Brocklebank v Johnson*, 20 Bear 205, *Re Bywater* 18 Ch D 17, 19, *Amlithayyan v Ketharamayyan* 14 M 65, *Kerr v Clifton* 8 Eq 462
 (h) *Langham v Sanford* 19 Vex 649
 (i) *Ulrich v Litchfield* 2 Atk 372, *Sherat v Beniley* 2 My & K 165
 (j) *Egerton v Brownlow* 4 H L C 1, 181, *Re Bywater* 18 Ch D (29) see S 138
 (k) *Amlithayyan v Ketharamayyan* 14 M 65
 (l) *Shookmay v Monohari* 7 C (292)
 (m) *At. Gent v Hornwall* 29 B 375, 351, 7 Bom L R 236.

matter, therefore, the section does not apply where they are not to be read together but are intended to provide for different circumstances (a).

89. (S. 76). A will or bequest not expressive of
Will or bequest any definite intention is void for un-
void for uncertainty. certainty.

Illustration.

If a testator says "I bequeath goods to A," or "I bequeath to A," or "I leave to A all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath, 'money,' 'wheat,' 'oil'" or the like, without saying how much, this is void

1. The section. The section applies to the wills of Hindus, *etc.*,

2. The rule. Rules of construction are guides to help the court to ascertain the intention of the testator (b) When, however, the will of a testator is so vague or indefinite that the court with the help of the rules laid down in the previous sections fails to discover from the language of the will what the testator intended to give or whom he intended to benefit, the court is not free to speculate but must declare the will or the particular gift to be void. The court is no doubt anxious to avoid intestacy, but it cannot for that purpose change the will or construe it in a manner not warranted by the law. A gift may therefore be void when it is impossible to ascertain the subject matter or object of a gift "To the validity of every disposition it is requisite that there be a definite subject and object, and uncertainty in either of these particulars is fatal" (c).

3 Uncertainty in subject matter. A bequest of "some of my linen" (d), or "of a handsome gratuity to each of my executors" (e), or a direction to the executors, "you should give my brothers their wives and children, according to your wishes" (f), has been held to be void for uncertainty, the testator not having indicated the quantity or amount of things he intended to bequeath. Where a testator gave lands to her daughter provided she married a man possessed of property of equal value, but if she married one who possessed less, in that case lands of equal value belonging to the testator would be given to her and the remainder of the property was "to pass over and be given up" to another daughter. *Held*, the gift over was void for uncertainty (g)

4. Where the amount can be made certain. Sometimes the amount though not fixed by the testator can be ascertained or estimated from the will and in such cases the gift will not be void for uncertainty. Thus, a provision for the payment of a suitable sum of money as remuneration to the trustees (h), or for the maintenance and education of a person (i), or a gift of portions to be determined by the testator's wife and executors (j), or a bequest of "£3000 or

(a) *Damodaradas v. Dasgahat*, 25 I. A. 126; 22 B. 833

(b) See S. 74 note

(c) *Asien v. Asien*, (1894) 3 Ch. 260.

(d) *Peck v. Halsey*, 2 P. W. 347

(e) *Jucker v. Jucker*, 9 Sim. 503

(f) *Kumaramani v. Sukeraya*, 9 A.L.

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(g) *Jones v. Hancock*, 4 Dow. 143

(h) *Jackson v. Hammon*, 3 J. & Lat. 702

(i) *Price v. Fuchs*, 2 Beav. 430

(j) *Cona v. Burns*, (1872) 1 L. 337

thereabouts" (a), or of "a sum of £50 or £100" or "a sum not exceeding £100" (b), has been held to be good. A gift to "get a Siva's temple erected at a reasonable cost in a suitable place within the compound" of the house (c), or for spending a suitable sum for *Sradh*, feeding of the poor, etc. (d), or for the establishment of a *Sdavarat* (the testator maintaining one in his life time) is good (e).

5. Gift over when void for uncertainty. In *re Thomson's Estate* (f), the prior gift was construed as conferring a limited estate on the first legatee without any power of disposition and the gift over was held to be good. But if the first gift confers an absolute estate, the gift over is void (g). It is a question of construction of the testator's intention (h). A gift of the income of a fund or property to A and what is saved therefrom to B is void for uncertainty so far as the gift to B is concerned (i).

6. Effect of gift over where prior gift is void. Where the prior gift is void, the gift of the surplus or residue of the fund or of the testator's estate is void for uncertainty, if the amount of the prior gift cannot be ascertained (j). Thus a testatrix by her will gave the residue of her estate to her executors for the purpose of building or purchasing a chapel where it may appear to them to be most wanted and the surplus, if any, to be spent in such charitable uses as the executors should think fit and proper, held, the gifts for the chapel and of the surplus were both void (k).

Where, however, the amount of the prior gift can be ascertained then the legacy will not fail (l). Where the whole of the legacy is likely to be swallowed up by the prior gift, the gift over will fail (m); but not where a substantial sum will be left (n). Ordinarily the amount of the prior legacy will be deducted from the gift over (o) but in some cases it has not been allowed to be so deducted (p).

7. Uncertainty avoided by selection by the legatee. In some cases uncertainty is avoided by the legatees being allowed to select what they

- (a) *Oddie v. Brown*, 4 D. G. & J. 179.
- (b) *Seale v. Seale*, 1 P. W. 290; *Gough v. Bull*, 16 Sim. 45.
- (c) In such a case the legatee is entitled to the larger sum. *Gokool v. Issur*, 14 C. 222.
- (d) *Dwarika v. Burroda*, 4 C. 443; see *Kedar v. Alul*, 12 C. W. N. 1083.
- (e) *Jumna Bai v. Khimji*, 14 B. 1.
- (f) 14 Ch. D. 263; see *Re Stringer's Estate*, 6 Ch. D. 1, 18; *Re Lowman*, (1895) 2 Ch. 348; *Re Sanford*, (1901) 1 Ch. 939; 440 7 Ed.
- (g) *Re Percy*, 24 Ch. D. 616; *Henderson v. Carr*, 29 Beav. 216 (two cases discussed); *Re Jones* (1893) 1 Ch. 435.
- (h) *Adm. Genl. v. White*, 13 M. 379.
- (i) *Est v. Hughes*, 6 Beav. 342; *Cawman v. Harrison*, 22 L. J. Ch. 993; *Bal. Bapt. v. Jannadas*, 22 B. 774.

- (j) *Fowler v. Fowler*, 33 Beav. 616; *Att. Genl. v. Hinxman*, 2 J. & W. 270.
- (k) *Chapman v. Brown*, 6 Ves. 404; *Surbomungola v. Mohendra*, 4 C. 508.
- (l) *Mitford v. Reynolds*, 16 Sim. 105, where the amount cannot be ascertained the legacy will fail, *Att. Genl. v. Hinxman*, 2 J. & W. 270.
- (m) *Cramp v. Playfoot*, 4 K. & J. 479.
- (n) *Fisk v. Att. Genl.*, 4 Eq. 521; *Re Williams*, 5 Ch. D. 735; *Morari v. Nandai*, 17 B. 351 (cases discussed); *Re Birkell*, 9 Ch. 576 (two cases discussed), *Id.* in *Re Rogerson*, (1901) 1 Ch. 715.
- (o) *Hoare v. Osborne*, 1 Eq. 585; *Re Vaughan*, 33 Ch. D. 187; *Re Ripley's Trust*, 36 L. J. Ch. 147.
- (p) *Re Birkell*, 9 Ch. 576; *Re Rogerson*, (1901) 1 Ch. 715.

would take. Thus a testator having three houses in K Street gave two to trustees upon trust to pay the rents and profits to P for life and then to the residuary legatee, held the legatee could select which two of the three houses he would take (a)

Sometimes the testator gives an option to the legatee to choose (b) or authorises a third person to choose for the legatee (c). In such cases an equal division has been allowed (d). In some cases a legatee who was allowed to select what he should take has been held entitled to the whole (e). On the other hand, where there was a gift by the testator of all his houses to trustees to convey one to M which she might choose and all others to C and M died without choosing a house, the gift to C failed (f).

The rule applicable in these cases has been thus laid down "A testator who has several properties all having the same description may by his will give one of them to a legatee and leave the choice of that one to the legatee and such a gift is clearly valid. And the fact that the legatee is able to select may appear either by express words used in the will, or by reasonable inference from it. And *prima facie* if the testator gives one of such properties to a legatee without saying more than the reasonable inference is that the testator intended the legatee to select and this whether the fact appears on the face of the will or otherwise." But the case is different where the testator makes the choice himself but his description of the properties is so ambiguous that the court cannot say which properties were intended to be given to which legatee then the gift becomes void for uncertainty. The court cannot confer an option on the legatees (g).

8 Charitable and religious bequests

(i) *Good charitable bequests* There has been a latitude allowed to charitable bequests so that when the general intention is indicated the court will find the means of carrying the details into operation (h). Charitable bequests are objects of peculiar favour (i). A legacy to a vicar and churchwardens for the time being of K to apply it in such manner as they shall in their sole discretion think fit has been held to be good (j). Similarly, a direction to executors and trustees to set apart a fund for distribution among the poor relations of the testator, 'the amounts and the persons who may be entitled to the benefit of this provision shall be entirely at the discretion of the executors whose decision shall be final,' was held to be a good gift (k). Gifts to the commanding officer for any purpose

- (a) *Tapley v Eagleston* 12 Ch D 683
Hobson v Blackburn 1 My & K 571
 sold in *Narayanamsami v Perathambi* 18 M 460, *Richardson v Watson* 4 B & Ad 787
 (b) *Boyce v Boyce* 16 Sim 476,
Kennedy v Kennedy 10 Hare 438
 (c) *Wilson v Wilson* 1 D G & Sm 152
Re Coun (1898) 1 Ir 337
 (d) *Robinson v Wheelwright* 21 Beav 214,
Salisbury v Denton 3 K & J 529
 (e) *Arthur v Mackinson* 11 Ch D 385,
Re Sharland 74 L T 664
 (f) *Boyce v Boyce*, 16 Sim 476.
 (g) *Asten v Asten* (1894) 3 Ch 260
 approved in *Re Cheadle* (1900) 2

- Ch 620
 (h) *Magistrates of Dundee v Morris* 3 Macq 134 166
Weir v Crum Brown 1908 A C 162
 (i) *Dick v Audsley* 1908 A C 347
 (j) *Re Garrard* (1907) 1 Ch 382
Smith v Massey 30 B 500
 Bom L R 322
Kanhaya v Ajudhia 41 C 396
 (k) *Manorama v Kali* 31 C 166,
All Genl v Duke of Northumberland 7 Ch D 745
 sold *Parball v Ram Barun* 31 C 895 (see cases discussed)
Prafulla v Jogendra 1 C L J 605
 9 C W N 528
 see *Gordhan v Chunnit* 30 A 111
 5 A L J 23

uncertain expression A gift to be employed in the service of our Lord and Master 'or "for the worship of God" is good (a)

In case of a religious dedication the test is whether the dedication is real and *bonafide* or whether it is colourable and nominal and the real intention is to create an interest in the heirs in perpetuity (b)

11. Uncertainty of object A gift will fail for uncertainty of object unless the equivocation arising is removed by evidence of testator's intention (c) Thus a gift to the deceased son of A named B who had several sons all deceased and named B (d), a gift to one of the sons of A even though only one son of A may be living (e), an appointment of 'one of my sisters my sole executrix', where the testator had three sisters (f), is void But a gift to A for life and after his death to be divided between one child of A, one child of B one child of C and one child of D, was construed as a gift to the eldest child of each (g) A gift 'to all my grandchildren with the exception of one, viz ' was held to mean a gift to the class unaffected by the words or the blank which followed (h) A direction to spend the residue in proper and just acts for the testator's benefit (i), or a gift to a legatee to be spent 'on good works' is an absolute gift, the condition being void for uncertainty (j) A gift to "my heirs or next of kin" is void for uncertainty (k) A gift to A or B in the absence of an intention to the contrary is construed as substitutional, so that if A or any member of the class designated as A were to survive the testator B would not take (l)

In the case of gift to a charity where there is no institution answering to the name given by the testator, the court will allow a division of the fund among the claimants answering to the description (m) But a gift to trustees to dispose of the same as they think fit is too vague and therefore void for uncertainty (n) Where a testatrix bequeathed £ 4000 to A "for the charitable purposes agreed upon between us," held, evidence was admissible to show the purposes agreed upon and there was a valid charitable bequest for the purposes disclosed by the evidence (o) but a direction to dispose of the estate 'in accordance with my wishes verbally expressed by me to her ' could not be given effect to as parol evidence was not admissible (p) In a case of a gift to a corporation the gift was held void for uncertainty, because the testator did not indicate the purpose or object of the gift (q)

Where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them (such as 'charitable' or 'benevolent' or 'charitable or philanthropic' or 'charitable' or 'pious' purposes) or where

(a) *Farguhar v Darling* (1876) 1 Ch 50; *All Genl v Pearson* 3 Mer 353, 409

(b) *Bende v Sila Ram*, 6 A L J 144 11 C 656, see *Bhuggokulity v Goormo Pearson*, 25 C 112, *Rajendra v Sham* 6 C 106

(c) *Donaldson v Bamber* (1877) 1 Ch 75

(d) *Donaldson v Bamber* (1877) 1 Ch 75

(e) *Illingworth v Cooke* 9 Hare 37

(f) *Re Blackwell* 2 P D 72

(g) *Powell v Davies* 1 Beav 532

(h) *Illingworth v Cooke* 9 Hare 37

(i) *Gokul v Issur* 14 C 222

(j) *Bai Bapi v Jannadas* 22 B 774

(k) *Lowndes v Stone* 4 Ves 647

(l) *Re Roberts* (1903) 2 Ch 200, *Re*

Coley (1901) 1 Ch 42, *contra Re*

Thompsons Trusts 9 Ch D 607

(m) *Re Allchins Trusts* 14 Eq 232

(n) *Stubb v Sargan* 3 My & L 507

(o) *Re Huxtable* (1902) 2 Ch 703

(p) *Re Hefley* (1902) 2 Ch 466

(q) *Moor of Gloucester v Osborn* 1

11 L C 272 on app from 311

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the description includes purposes which may or may not be charitable (such as undertakings of public utility) and a discretion is vested in the trustees the whole gift fails for uncertainty (a) A gift for benevolent purposes has been held to be bad (b)

90. (S. 77). The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator

Words describing subject refer to property answering description at testator's death

1 The section The section applies to the wills of Hindus etc Under S 24 of the English Wills Act and obviously under this section also a will is to be construed as if the condition of things to which it refers was that immediately before the testator's death The court has no right to go into the history of the property of the testator and see when he came into possession of it (c) But this section does not say that we are to construe whatever a man says in his will as if it were made on the day of his death (d) A will does not for all purposes speak and take effect as if it had been executed immediately before the death of the testator The question is one of intention (e) The section does not supply defects in the testator's capacity and make an instrument valid which through the personal disability of the testator was invalid at its inception (f)

2 Old English law Before the Wills Act of 1837 there was no distinct enactment as there is now that a will must be construed as to property comprised in it as speaking from the death of the testator unless a contrary intention appeared (g) but it was so construed so far as personality (including leasehold), was concerned (h) With regard to real property a will could only pass lands of which the testator was seised both at the time of his making the will and at that of his death (i) freehold lands acquired subsequent to the execution of the will therefore did not pass in the absence of a clear intention expressed by the testator S 24 of the Wills Act has the effect now of placing real property on the same footing as personality

(a) *Hunter v All Genl* 1899 A C 309 323, *Re Macduff* (1896) 2 Ch 451 (charitable or philanthropic) see *Morice v Bishop of Durham* 9 Ves 339 10 Ves 522 *Kendall v Granger* 5 Beav 300 (relief of domestic distress or works of charity) *Bal Chadungal v Dady* 26 B 632 3 Bom L R 902 (charitable educational or philanthropic) but see *Smith v Massey* 30 B 500 8 Bom L R 322 *Hunter v All Genl*, 1899 A C 309 *Paras v Ram Baran*, 31 C 695 *Trikumdas v Hanjar* 9 Bom L R 560 *Hillam v Aenshaw* 5 Cl & F 111 (benevolent charitable and religious

purposes), but see *Milford v Reynolds* 1 Phill 185 *Trikumdas v Hanjar* 31 B 583, 9 Bom L R 560 (popular usefulness or charity)

(b) *All Genl v Brown* 1917 A C 393

(c) *Higgins v Dawson* (1902) A C 1

(d) *Re Portal & Lamb* 30 Ch D 50 cited in *Re Egan* (1909) 1 Ch 784

(e) *Re Holf's Trusts* 42 Ch 645 657

(f) J 396 7 Ed

(g) *Excess v Excess* 7 Ch D 475

(h) *Re Chapman*, (1904) 1 Ch 431 436

(i) *A G v Ligor* 8 Ves 256 263

uncertain expression A gift to be employed in the service of our Lord and Master or "for the worship of God" is good (a)

In case of a religious dedication the test is whether the dedication is real and *bonafide* or whether it is colourable and nominal and the real intention is to create an interest in the heirs in perpetuity (b)

11 Uncertainty of object A gift will fail for uncertainty of object unless the equivocation arising is removed by evidence of testator's intention (c) Thus a gift to the deceased son of A named B who had several sons all deceased and named B (d), a gift to one of the sons of A even though only one son of A may be living (e) an appointment of one of my sisters my sole executrix, where the testator had three sisters (f), is void But a gift to A for life and after his death to be divided between one child of A, one child of B one child of C and one child of D was construed as a gift to the eldest child of each (g) A gift to all my grandchildren with the exception of one viz was held to mean a gift to the class unaffected by the words or the blank which followed (h) A direction to spend the residue in proper and just acts for the testator's benefit (i) or a gift to a legatee to be spent on good works is an absolute gift the condition being void for uncertainty (j) A gift to my heirs or next of kin is void for uncertainty (k) A gift to A or B in the absence of an intention to the contrary is construed as substitutonal so that if A or any member of the class designated as A were to survive the testator B would not take (l)

In the case of gift to a charity where there is no institution answering to the name given by the testator, the court will allow a division of the fund among the claimants answering to the description (m) But a gift to trustees to dispose of the same as they think fit is too vague and therefore void for uncertainty (n) Where a testatrix bequeathed £ 4000 to A for the charitable purposes agreed upon between us, held evidence was admissible to show the purposes agreed upon and there was a valid charitable bequest for the purposes disclosed by the evidence (o) but a direction to dispose of the estate in accordance with my wishes verbally expressed by me to her could not be given effect to as parol evidence was not admissible (p) In a case of a gift to a corporation the gift was held void for uncertainty because the testator did not indicate the purpose or object of the gift (q)

Where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them (such as charitable or benevolent or charitable or philanthropic or charitable or pious purposes) or where

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| <p>(a) <i>Farquhar v Darling</i> (1876) 1 Ch 50
 <i>All Genl v Pearson</i> 3 Mer 353 409</p> <p>(b) <i>Benside v Sila Ram</i> 6 A L J 144
 <i>11 C 656, see Bhuggokutti v Goomoo Prasanna</i> 25 C 112
 <i>Rajendra v Sham</i> 6 C 106</p> <p>(c) <i>Donaldson v Bamber</i> (1877) 1 Ch 75</p> <p>(d) <i>Donaldson v Bamber</i> (1877) 1 Ch 75</p> <p>(e) <i>Illingworth v Cooke</i> 9 HLC 37</p> <p>(f) <i>Re Blackwell</i> 2 P D 72</p> <p>(g) <i>Powell v Dace</i> 1 Beav 532</p> | <p>(h) <i>Illingworth v Cooke</i> 9 HLC 37</p> <p>(i) <i>Gokul v Issur</i> 14 C 222</p> <p>(j) <i>Bai Bapi v Jannadas</i> 2 B 774</p> <p>(k) <i>Lowndes v Sone</i> 4 Ves 647</p> <p>(l) <i>Re Roberts</i> (1933) 2 Ch 200
 <i>Re Coley</i> (1901) 1 Ch 43
 <i>conf a Re Thompson's Trusts</i> 9 Ch D 697</p> <p>(m) <i>Re Alchin's Trusts</i> 14 Eq 233</p> <p>(n) <i>Stubbs v Sargan</i> 3 My & Cr 507</p> <p>(o) <i>Re Hustable</i> (1927) 2 Ch 793</p> <p>(p) <i>Re Heilev</i> (1921) 2 Ch 866</p> <p>(q) <i>Moss v of Gloucester v O'Connell</i> 11 L C 272 on app from 311s 131</p> |
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the description includes purposes which may or may not be charitable (such as 'undertakings of public utility') and a discretion is vested in the trustees the whole gift fails for uncertainty (a) A gift for benevolent purposes has been held to be bad (b)

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(b) *Att Genl v Brown* 1917 A C 393

(c) *Higgins v Dawson*, (1902) A C 1

(d) *Re Portal & Lamb* 30 Ch D 50 cited in *Re Goans* (1909) 1 Ch 784

(e) *Re Well's Trusts*, 42 Ch 646, 657

(f) J 396 7 Ed.

(g) *Escey v Escey*, 7 Ch D 428

(h) *Re Chapman*, (1904) 1 Ch 431 436.

(i) *A G v Vigor* 8 Ves. 256, 283

3 The rule. The rule embodied in this section has been thus stated.—“Description of real or personal estate, the subject of gift, *prima facie* refers to and comprises the property answering to the description at the death of the testator” (a). It may be taken now as settled that if a will contains a description of any property such a description must be held to include and apply to whatever property the testator has at his death which answers the description, unless a contrary intention appears by the will (b). Therefore, where a testator has given “my personal estate to A” and “my real estate to B”, he means, under the present law, that which shall be personal estate at his death is to go to A and that which shall be his real estate at the time of his death is to go to B. There may be constant fluctuations in the nature of the testator’s property and there may be an element of uncertainty as to the nature of the testator’s property, but the moment we get the property fixed—“my estate at the time of my death”—there is an end of the uncertainty (c). Thus, a gift of certain annuities or shares passes what answer to the description at the time of the testator’s death even though after the date of the will he has dealt with them by adding to (d) or reducing (e) them. A bequest is called generic when it is of such a nature as may be increased or diminished (f). A testator bequeathed his interest in a partnership business to his wife, before his death he acquired the shares of his partners, *held*, the widow was entitled to the whole of the profits of the business belonging to the testator at his death (g). A will, in the absence of a contrary intention, is not only regarded as speaking from the date of the testator’s death so far as the property comprised in it is concerned, but its validity with reference to the devise of any particular property thereby made also depends upon the testator’s statutory or other lawful disposing power over that property at that time (h).

The section applies to powers of appointment. A general power of appointment is validly exercised by a will containing a general bequest and executed before the power is created provided the will contains words which “would have operated to execute the power had it been in existence at the date of the will” (i). The rule applies to specific and residuary gifts (j), thus a devise of “houses and effects known as Cross Villa situated in T” was held to pass buildings subsequently erected on the lands by the testator (k). A devise of “mansion and estate called Cleve Court” passed properties in respect of which there was a contract to purchase before the date of the will (l), a devise of “the lands of Cranmore” passed after acquired properties (m).

- (a) *Hawkins, Construction of Wills* see *Trinder v Trinder*, 1 Eq 69.
 (b) *Re Bridger*, (1894) 1 Ch 297.
 (c) *Chandler v Pocock* 15 Ch D 491.
Re Slater (19 6) 2 Ch 460, citing *Trinder v Trinder*, 1 Eq 695.
 (d) *Goodlad v Burnett*, 1 K & J 341 (a testator is supposed to know the operation of this rule) *Re Clifford*, (1912) 1 Ch. 29.
 (e) *Re Glyn*, (1939) 1 Ch 345.
 (f) *Re Barendse*, 1928 Ch 577.
 (g) *Re Russell* 19 Ch D 432.
 (h) *Krishna Kumari v Rajendra* 57 1 L J 495, 116 1 C 397.
 (i) 185, 7 E3 *Boyes v Cook*, 14 Ch D 53, *Re Horwood* 27 C

- D 284, *Atrey v Bower* 12 A C 263, *Re James* (1910) 1 Ch 157 (where testatrix became beneficially entitled to property appointed), see S 91 n 7.
 (j) *Loft, Langdale v Briggs* 8 D M & G (435) (rule fully explained).
Re Ord, 12 Ch D 22, *Re Bridger* (1894) 1 Ch 297.
 (k) *Re Evans* (1907) 1 Ch 784, *Stevens v Willis* (1911) 2 Ch 563.
 (l) *Wells v Bung* 1 K & J 580, *Trishwanandas v Gopaldas* 18 B 7 (in the absence of a contrary intent on the will).
 (m) *Stevens v Hally* 8 1s Ch. R. 410

Where a testator released his son from all claims and demands and all other moneys due from him to me, *held* the gift was generic, and in the absence of sufficient expression of intention to the contrary, the will operated from the testator's death and therefore released the son from liability in respect of debts which became due after the date of the will (a) The term debt refers to indebtedness in the strict sense: *e. g.* moneys actually due and owing and not to contingencies which may ripen at a future date *e. g.* under a guarantee (b)

4 Where there are words of futurity The rule that a will is to be construed as if it was executed before the death of the testator applies in the absence of a contrary intention, only to properties comprised in the will (c) As regards words of futurity they should be read as speaking from the date of the making of the will and not from the date of the testator's death That is however only a presumption and the courts are to see from what date the testator intended the words to speak (d) In other words the courts are to ascertain the testator's intention from the date of the will (e) Under the circumstances of a particular case the court may construe such words as referring to events which are not necessarily future (f) In cases of this kind the first question to be considered is what does the will mean? What is the testator describing or dealing with (g)? or what is it that is bequeathed? The next question is, where is that which was bequeathed? Did it or did it not exist at the testator's death (h)?

5 Contrary intention The contrary intention must clearly appear from the will itself (i) When the date of the will as contrasted with the time of the testator's death is clearly referred to in the will that is evidence of a contrary intention (j) The word now is not evidence of a contrary intention (k), it may be part of the description of the property (l) The expression 'property I am possessed of' occurring in a will has been held to mean, in the absence of a contrary intention, 'property I am possessed of at the time of my death' (m) and therefore after acquired properties will pass The use of the present tense is not sufficient evidence of a contrary intention (n)

The word 'my' in reference to a particular thing, *e. g.* a gift of my piano (o) has been construed to mean that which the testator possessed at the time of the making of the will but in reference to a bequest of that which is generic (*i. e.* capable of increase or diminution) the Act requires something more on the face of

(a) *Greenell v. Fierll* 7 Ch D 428
(see cases *reld.* to)

(b) *Re Mitchell* (1913) 1 Ch 201

(c) *Bullock v. Bennett* 7 D M & G 283

(d) *Re Chapman* (1934) 1 Ch 431

(e) *Re Cope* (1908) 2 Ch 1

(f) *Loring v. Thomas* 1 Dr & Sm. 497,
reld. to in *Gorringe v. Mahabadi*
1907 A C 215 (leading case),
Re Larter (1906) 2 Ch 117,
Barnackough v. Cooper (1908) 2 Ch.
121 n.

(g) *Sinney v. Sinney* 17 Eq 65 69

(h) *Re Brule* 4 C. P D 336 341

(i) *Boyes v. Cook* 14 Ch D 53

(j) *Cole v. Scot* 1 Mac & G. 518
cited in *Re Ord* 12 Ch D 22.

(k) *Re Ord* 12 Ch D 22 24
Alacandaz v. Danaboli 99 I C.
775 after acquired properties passed

(l) *Re Willis* (1911) 2 Ch 563

(m) *Liford v. Leek* 33 Bear 3 J. Doe
v. Walker 12 M & W 591

(n) *Jensen v. Arden* 15 C. V. N. 147

(o) *Re Sykes* (1927) 1 Ch. 354

a will for the purpose of indicating such contrary intention so as to limit the bequest only to the thing in existence at the date of the will (a)

6 Specific gift which has been dealt with or is non-existent at the time of the testator's death. The rule does not apply where the property bequeathed is a specific thing in existence at the date of the will (b) *e.g.* a bequest of £500 being part of a certain stock which the testatrix did not possess at the time of her death (c), a bequest of £1000 at present secured by a certain mortgage which was paid off before the testator's death (d) and a bequest of 300 l or thereabouts invested in G B N Co (e), a bequest of the interest arising from money invested in the L W Co but the Co was acquired by another body which issued the testator certain stock in another Co (f) are cases where the gifts were of distinct and specific things and therefore failed *ie* the gifts were adcoemed. But where a testator gave 25 shares in a Company to A and after the date of the will the original £50 shares were converted into £10 ones and the testator had sold both kinds of shares before his death held it was a general legacy and referred to the shares left by the testator (g)

Where the testator himself has dealt with his property *e.g.* the shares bequeathed, by selling them and buying others the question is whether the new shares will pass under the terms of the bequest. A bequest may be so worded that the subject matter is to pass whatever the condition with respect to investment or otherwise in which it may be found at the testator's death. The intention of the testator will determine in case of gift of money described as invested in a particular way, whether the legatee is to have the money however it may be invested or whether the condition of the subject of the gift in reference to investment is the governing part of the description of the subject matter of the bequest (h). Thus where the bequest was of my 1000 N B L Preference shares and the testator sold the shares he held at the time of the will and then bought from time to time other shares in the railway and stock held the bequest related to a specific thing incapable of increase or diminution and there was sufficient evidence of contrary intention in the word my and the bequest was therefore adcoemed (i). But where a testator bequeathed his leasehold by will and subsequently acquired the fee such fee passed, because the testator did not mean to say I give the leasehold and nothing else (j) the case is different where the intention is to give nothing except the interest subsisting at the time of the will (k).

- (a) *Re Clifford* (1912) 1 Ch 29 *Re Slater* (1906) 2 Cl 480 *Lady Langdale v Briggs* 8 D M & G (437) *Goodlad v Burnett* 1 K & J 341 *Re Reeves* 1928 Cl 351
- (b) *Re Evans* (1909) 1 Cl 724 *fold in Re Dales* (1925) 1 Ch 642 650
- (c) *McClellan v Clark* 50 L. T 616
- (d) *Re Role* 61 L. T 497
- (e) *Kermode v Macdonald* 1 Eq 457 3 Ch 594
- (f) *Re Slater* (1906) 2 Cl 480, *Harrison v Jackson* 7 Ch D 339 *cc King Le Grice v Inch* 3 Mer

- 50
- (g) *Re Gillins* (1909) 1 Ch 345
- (h) *Re Slater* (1906) 2 Ch 480, *Re Clifford* (1912) 1 Ch 29 *Re Leeming* (1912) 1 Ch 828 *Re Kuypers* (1925) 1 Cl 244
- (i) *Re Potal & Lamb* 30 Ch D 50; *Re Slater* (1906) 2 Ch 480 *Re Gillins* (1909) 1 Ch 345; *Re Clifford* (1912) 1 Ch 29
- (j) *Cox v Bennett* 6 E; 422 *Saxton v Saxton* 13 Cl D 559 *Miles v Miles* 1 Eq 467; *Wedgwood v Denon* 12 Eq 290; *Re Reeves* (1928) Cl 351
- (k) *Emuss v Smith* 2 D G & S 50 722 *Re Knight* 34 Cl D 510

The rule of construction has been thus succinctly stated in *re Evans* (a) — The Court in construing a will must, in order to give effect to it take into consideration the condition of things in reference to which it is made. For instance if a testator makes a will devising his freehold house in Cavendish Square, and then sells it purchasing another in the same Square the house subsequently purchased would not pass by the devise. It is well settled, that there may be such a specific description of the subject of a gift as to show that what was intended to pass whether real or personal estate was some particular thing in existence at the date of the will. When however the description is generic as all my lands in the county of X, the subject of the devise being capable of increase or diminution all the testator's lands in the county of X at the date of his death will pass and where there is such a particularity in the description of the subject of a gift as to show that it was some object in existence at the date of the will that was intended to pass it is considered that there is sufficient evidence of a contrary intention to exclude the application of the provisions of this rule.

7 Accessories Accessories follow the principal under the doctrine of implied grant. Where a testator devised his house and his field to two different devisees, it was held the easements annexed to the properties will pass to the devisees without any express words in the instruments (b).

8 Inaccuracy An inaccuracy in the description of a gift is not fatal (c) but where the testator had no property at the date of the will answering to the description given in the will nor any at the time of his death the gift will fail and this section has no application to such a case (d).

9 Conversion Where there is a contract giving an option of purchase of immovable property devised in the absence of a contrary intention, as the will speaks from the moment of the testator's death the rights under the contract will pass to the legatee (e). When a will is made after a contract giving an option to purchase and the testator knowing of the existence of the contract devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into in such a case it is considered that there is sufficient evidence of contrary intention (f).

10 Object of gift With regard to persons referred to in a will the rule is that the person if in existence who answers to the description in the will at the time of its making is to be understood as the object of the testator's bounty. Thus where there was a devise in favour of the eldest son of my sister who had at the time two sons but the eldest son predeceased the testator the devise lapsed the eldest surviving son at the time of the testator's death was not entitled to the gift (g). In a will when there is a gift by the testator to the wife of a person and that person has at the time a wife living and acknowledged by the testator the testator *prima facie*

- (a) (1909) 1 Ch 784
 (b) *Phillips v Low* (1892) 1 Ch 47
 (see cases discussed)
 (c) *Saxton v Saxton* 13 Ch D 359
 (d) *Re Knight* 34 Ch D 518, *Barber v Wood* 4 Ch D 685
 (e) *Re Bancroft* (1928) 1 Ch 577
 (f) *Beeding v Beeding* 1 J & H

- 424, *Re Pyle* (1895) 1 Ch 724
 (see cases discussed)
 (g) *Amyot v Dwanis* 1934 A C 268,
Lomax v Holmden 1 Ves Sen.
 290 *Meredith v Trefry* 12 Ch D
 170 *Bathurst v Gillington* 2 A.C.
 693 and other cases *rel'd.* to

intends to refer to the existing wife and if there be no wife then the first woman answering to the description (a) Similarly, in case of a gift to the husband of a person (b)

In case of gift to a class, if the gift be immediate those answering to the description at the death of the testator are entitled to take (c) If, however the period of distribution be postponed, the gift will apply not only to the members of the class existing at the death of the testator, but will include those born after his death (d), so that those living at the death of the testator are liable to be divested *pro tanto* by the birth of each additional member (e) Where the gift is contingent all who come into existence before the first member attains a vested interest, will, if the contingency be satisfied as regards them, be entitled to a share (f) Where the gift is contingent and is liable to infringe the rule against perpetuity, then if the contingency has been removed in respect of any member of the class the gift will be valid in respect of such member (g) If however the contingency has not been removed at the death of the testator then the gift to the whole class must fail according to the rule laid down in *Pearks v Moreley* (h)

91 (S. 78). Unless a contrary intention appears by the

Power of appointment executed by general bequest

will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will

to any object he may think proper, and shall operate as an execution of such power, and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power

1 The section The section does not apply to the wills of Hindus etc The section makes it useless to speculate about the intention of the testator, i.e., whether he intended to exercise a general power of appointment or not Thus a power to appoint any sum not exceeding £2000 was validly exercised up to that amount by a gift by will of the real and personal estate that the testatrix might dispose of (i)

- (a) *Borcham v Birell* 8 Hare 131
Re Burrows' Trust 10 L. T. 184
 approved in *Re Coles* (1903 2 Ch. 102) The *prima facie* view may be negatived if there be contrary intention in the will *Re Drew* (1899) 1 Ch. 336 *Longworth v Bellamy* 40 L. J. Ch. 513
 (b) *Re Ford v Hills* 7 Ch. 7, see cases cited under S. 76 n. 6
 (c) *Viner v Frazer* 5 Cox 192,
Dalston v Dallas 14 Ves. 576
 (d) *Arbuthnot v Dentington* 3 Bro. C. C. 41
 (e) *Re Emmet's Estate* 13 Ch. D. 444, *Opferken v Herr* 10 Hare 441, *Hellin v Rogers* 3 D. 81

- & G. 649
 (f) *Whitbread v Lord St John* 10 Ves. 152, *Clarke v Clarke* 8 Sim. 59,
Gilmour v Daunt 3 K. & J. 49
 (g) *Fulden v Matthews* 10 Ch. D. 264
 (h) 5 A. C. 714, *Re Menia* (1891) 3 Ch. 197 where *Ellis v Ellis* 12 Sim. 276 *Re Coppas & Co's* 35 Ch. D. 350 in fact as they departed from the rule in *Andrews v Paterson* 3 Bro. C. C. 431 are commended upon
 (i) *Greene v Corbin* 34 Ch. D. 65 111 in *Re Hickman* (1910) 2 Ch. 216

2. Power of appointment A power is an authority reserved by or limited to, a person to dispose, either wholly or partially, of real or personal property, either for his own benefit or for that of others (a) The word is used as a technical term and is distinct from the dominion which a man has over his own estate by virtue of ownership (b) The donee of a power has a right of disposition over the property subject to the power, which may be either limited or unlimited, according to terms upon which it is granted Conditions and limitations imposed by the settlement creating power (not being conditions as to the mode of its execution), cannot be disregarded and the power in such a case is not general (c) Thus a power may be required to be exercised by "expressly referring to this power", in which case a gift of the residue of real and personal estate 'over which I shall have any power of disposition by will' is a sufficient reference to exercise the power (d) The section only says that the intention to exercise a power need not expressly be stated where power is given to appoint by will any manner

3 General and special powers Powers may be either general or limited General powers are such as the donee can exercise in favour of such person or persons as he pleases including himself (e), or his own executors or administrators (f) Limited powers, also called special powers are such as the donee can exercise only in favour of certain specified persons or classes A power is nevertheless general though exercisable by will only (g) A power to appoint to whom the donee pleases except A is not a general power unless A were dead when the power was exercised (h), a power to appoint by will specially referring to the power, or before a particular time is not a general power (i)

4 The rule Formerly in England it used to be held that dispositions describing property only by general terms would not operate by way of appointment, if there was anything else upon which they could operate, unless there was a reference to the power or to the subject of it The British Legislature, however thinking that the intention of the testator would frequently be disappointed by this rule enacted that wherever a person had a general power a general devise of all his real estate should operate upon that which was subject to his power (j), and this law is embodied in this section The enactment was intended to get rid of the difference between property and power and to make it unnecessary in framing a will to refer to the instrument creating the power or to the actual subject of the power (k) Thus, a testatrix, who had a general power of appointment over sums of money, after making certain pecuniary legacies gave the residue to A and B, held, this was a good execution of the power, although there was no

- (a) *Pierre v Clement*, 18 Ch D 499
 (b) *Ex p Gilchrist* 17 Q B D 521
Tremayne v Rashleigh (1908) 1 Ch 681
 (c) *Re Phillips* 41 Ch D 417, *Re Davies*, (1892) 3 Ch 63
 (d) *Bell v Lane*, (1908) 2 Ch 581, see *Phillips v Cayley* 43 Ch D 222
 (e) *Irwin v Farrer* 19 Ves 86
 (f) *Mackenzie v Mackenzie* 3 Mac & G 559
 (g) *Lefevre v Freeland* 24 Beav 403

- Re Powell's Trusts* 39 L J Ch 188
 (h) *Re Byron's Settlement*, (1891) 3 Ch 474
 (i) *Phillips v Cayley* 43 Ch D 222, *Davies v Davies* (1892) 3 Cl 63, *Re Waterhouse*, (1898) 77 L J Ch 30
 (j) *Wills Act* 1 Vict c 26 S 27, *Shelford v Acland* 23 Beav 10, *Lake v Currie* 2 D G M & G 536
 (k) *Re Jacob*, (1907) 1 Ch 445, *Re Wilkinson*, 4 Ch 587

Where a testator has both a special and a general power the exercise of the former is not contrary evidence of exercise of the latter, but the latter may also be exercised (a)

11. Failure of appointment Where a testator by a will exercises a general power of appointment but the disposition becomes ineffectual for some reason or other, the question arises as to the destination of the property. It has been answered thus — 'The question in all cases of this class now before me is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition expressed (b) In the former case the property will descend in the same way as that of the donee of the power (c) in the latter case the property goes as in default of appointment (d)

12 Appointment under Hindu law A general power of appointment is not opposed to the principle of Hindu law and is of great convenience in practice provided the limitations laid down in the *Tagore* case are observed (e)

92. (S. 79). Where property is bequeathed to or for the benefit of certain objects as a specified person may appoint or for the benefit of certain objects in such proportions as a specified person may appoint, and the will does not provide for the event of no appointment being made, if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares

Illustration

A by his will bequeaths a fund to his wife for her life and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children

1. The section The section does not apply to the wills of Hindus etc., but it applies to the wills of Parsis (f)

The rule The principle underlying the section has been thus stated by Lord Cottenham — When there appears a general intention in favour of a class and a particular intention in favour of individuals of a class to be selected by another person and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class (g)

- (a) *Re Stiles* (1922) 2 Cl. 406
 (b) *Re De Lacy & Trusts* 3 Ir. L. Rep. (237) cited in *Re Pender's Settlement* 12 Cl. D. 657 *Coven v. Rowland* (1894) 1 Ch. 407 but evidence of intention was *Pickering v. Williams* 7 Ir. 310 *W. v. W.* & *Schneider* 9 Ir. 423 *Le Van Hagon* 16 Cl. 18
 (c) *Re Pender's Settlement* 12 Ch. D.

- 657
 (d) *Re Boyl* (1877) 2 Ch. 232
 (e) *Hal Mohd. v. Mohd. v. Mohd.* 24 I. A. 93 21 B. 769 *Jas. v. Jas.* 16 B. 422 *Gl. v. Gl.* 17 B. 600 616-18; *Le Van Hagon* 2 C. W. N. 223
 (f) *Burrough v. Ratanagar* 18 B. 1
 (g) *Burrough v. Ratanagar* 5 M. A. C. 72 see *Re D. v. D.* 43 W. R. 36

Accordingly the rule has been applied to cases of what are known as powers of the nature of trusts 'Where there is a mere power of disposing and it is not executed, the court cannot execute it, but wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the court will execute the trust. The trust need not be an express one, but "the court considers the power as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the Court will to a certain extent discharge the duty in his room and place. The court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it (a)

The rule as to the determination of property in default of execution of power of appointment has been thus laid down in *Lambert v Thwaites* (b) —Bearing in mind the rule that the existence of a power of appointment does not prevent the vesting of property in those who are to take in default of appointment although the exercise of the power will divest the estate (c) the general principle seems to be this 'If the instrument itself gives the property to a class, but gives a power to A to appoint in what shares and in what manner the members of that class shall take the property vests until the power is exercised in all members of the class, and they will all take in default of appointment but if the instrument does not contain a gift of the property to any class but only a power to A to give it, as he may think fit among members of that class those only can take in default of appointment who might have taken under an exercise of that power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it" In other words the Court will not imply a gift in default of appointment under English law to the objects of the power unless the will shews an intention on the part of the testator to create a trust in favour of the objects of the power (d)

Thus, where by a settlement a leasehold house was assigned to trustees upon trust, after certain prior interests in favour of A and B for C for life and after his death upon trust to assign the said premises unto and among such of his children and in such manner and proportions as he should by any writing appoint, held there was a trust for all the children of C in equal shares subject to a power of selection and distribution exercisable by C (e) The rule is the same whether there is a gift over in default of objects of the power or not (f), and even though the donee has power to exclude one class entirely, if there is an intention to give the property to the objects (g), but there must be a clear intention that the donor intended

(a) *Brown v Higgs* 8 Ves 561, *Wilson v Duguid* 24 Ch D 244, *Fehrsen v Simpson* 4 C. 514, *Butler v Gray* 5 Ch D 26, *Re Llewellyn's Settlement* (1921) 2 Ch 291

(b) 2 Eq 151

(c) *Doe v Mart'n* 4 T R 39

(d) *Re Weekes Settlement* (1897) 1 Ch. 289 fold in *Re Combe* (1925) Ch 210. *Re Weekes Settlement* has been commented on in *Farewell On*

Powers p 529 30 3 Ed for laying down that a gift in default may be implied without some expression of such intention in the instrument creating the power

(e) *Wilson v Duguid* 24 Ch D 244

(f) *Roddy v Fitzgerald* 6 H L C. 823 856, *Wilson v Duguid* 24 Ch D 244

(g) *Jones v Tor'n* 6 Sim. 255, *Little v Neil* 31 L. J Ch 677

the power to be in the nature of a trust, contrary intention defeats an implied trust (a)

There is an analogous class of cases where the power is not of the nature of a trust yet it has been held to create an implied gift. The donor of the power must manifest an intention that the objects of the power should not be disappointed and gives a power of selection to the donee then the subject of the power will pass to the objects even if the donee have failed to exercise the power (b)

By the term implied it is not to be understood that the court is to make any such presumption in favour of the objects of the power but the implication only arises where a testator manifests an intention that the objects of the power or some of them should take (c). In the absence of such intention or implication the objects of the power take nothing in default of appointment (d). If there is a gift over in default of appointment to the objects of the power no question of a gift by implication in favour of the objects of the power can arise for such a gift over is evidence of a contrary intention and the words of the power cannot operate to vest any estate in the objects of it by implication if there is no appointment (e)

3 Is not exercised. The section expressly provides only for the case of the power given by the will not being exercised (f). An instrument which exercises a power of revocation and new appointment must show not merely an intention to appoint but also an intention to revoke the subsisting appointment (g)

4 The rule applies to charities. Where a testator directed the residue of a fund to be given by my executors to such charitable institutions as I shall by any future codicil give the same and in default of any such gift to be distributed by my executors at their direction held there was a gift to charitable institutions to be chosen by the testator himself in default of such choice by his executors. The implied gift to charity was not taken away by mere words of distribution by executors (h). A gift to such charitable institution as the testator at all by codicil appoint is without more a class gift to charity though no codicil is made (i)

5 Legacy and special power. A legacy differs from a special power by the fact that the former operates by virtue of the will and of that alone. On the other hand an appointment under a limited power operates by virtue of the instrument creating the power. The English Wills Act has not dealt with limited powers (j) and the Succession Act makes no mention of it.

The donee of a power as such has no interest in the property by virtue of the power of distribution or selection bestowed upon him and in this respect such a power differs from a general power (k)

(a) *Re Weekes Settlement* (1897) 1 Ch 289; *Re Combe* 1925 Ch 210

(b) *Salisbury v Denton* 3 K. & J 529; *Lambert v Thwaites* 2 Eq 151

(c) *Re Weekes Settlement* (1897) 1 Ch 289

(d) *Re Weekes Settlement* (1897) 1 Ch 289. It there is a contrary intention an implied trust can arise. *Re Combe* 1925 Ch 210

(e) *Parsons v Parsons* 19 Beav 635; *Ridgdon v Harbison* 16 Q. B.

D. 85 H. 23 p. 70

(f) *Re Wells Trusts* 42 Ch. D. 646

(g) *Pomfret v Pelling* 5 D. M. & G. 775 approved in *Re Wells Trusts* 42 Ch. D. 646

(h) *Pacock v Alt Genl* 3 Ch. D. 342

(i) *Stills v Farmer* 1 Mer. 55; *Moggridge v Throckwell* 7 Ves. 36 held to be *Pacock v Alt Genl* 3 Ch. D. 342

(j) *Holland v Lawin* 26 Ch. D. 291

Re Hoar (1900) 2 Ch. 337

(k) *Blakeney v Blakeney* 6 W. 52

93 (S. 80). Where a bequest is made to the "heirs" or "right heirs" or "relations" or "nearest relations" or "family" or "kindred" or "nearest of kin" or "next of kin" of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustration.

(i) A leaves his property "to my own nearest relations." The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.

(ii) A bequeaths 10,000 rupees "to B for his life, and, after the death of B to my own right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property

(iii) A leaves his property to B, but if B dies before him, to B's next of kin; B dies before A, the property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts independently of such property

(iv) A leaves 10,000 rupees "to B for his life, and after his decease to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

1. The section The section does not apply to the wills of Hindus, *etc.* It deals with the case of a gift to a class or group of persons described as standing in a certain degree of relationship to an individual, but that individual, to whom these classes are described as being related to, is not the object of the bequest as is contemplated by S. 97.

2. Heirs or right heirs. A gift to the heir or right heirs of a person may be construed in more than one sense. It may be used to denote the whole line of succession (a), or, to refer to a particular person only who would answer to that description at a particular time (b), or, to designate a person or persons selected or pointed out by the testator in a particular way (c) In case of a gift to the heir of a particular person who is living, the gift is contingent, as the heir of a person cannot be determined until the death of that person, but the testator may intend to refer to the heir presumptive or heir-apparent The context will decide the meaning The onus lies upon those who would divert the words from its known legal acceptation (d) If a gift be to the testator's heirs or right heirs, the expression means his heir or heirs at common law (e).

(a) *Van Grutten v Forwell*, 1897 A C.

658.

(b) *Egans v Egan*, (1892) 2 Ch 173

(c) *Gast v Twyford*, 4 H L C. 517.

Jordan v Adams, 29 L J C. P.

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(d) *Doe v Perrell*, 6 M & G. 314, 363, see *Parker v Nickson*, 1 D G. J & S. 177

(e) *Garland v Beverley*, 9 Ch D. 213.

In English law prior to the Land Transfer Act of 1897 real property devolved on the heir and the personal property went to the next of kin of the deceased intestate, but the heir might take personal property given to the heir of a person by will as the person designated, the intention of the testator would prevail (a)

3 Relations or nearest relations (b) The term relations embraces kindred however remote but in order to avoid the failure of a gift on account of uncertainty it is settled that a bequest to relations implies a gift to the person or persons who will by virtue of the Statute of Distributions, take the personal estate, either as next of kin or by representation of next of kin (c). But this rule will not apply where the testator shows an intention to effect distribution in any other manner (d) The rule will not be departed from on slight grounds (e) The words 'relation' and 'relations' have the same meaning In the absence of a contrary intention (f) relations will include those related by half blood (g) Relations *prima facie* mean legitimate relations, but the context may show that illegitimate relations were intended to be included (h) If the testator be of illegitimate birth relations must mean illegitimate relations (i)

The term 'relations' does not extend to relations by affinity (j), unless the context shows that the testator intends to include them *e.g.*, where there is a gift to relations by blood or marriage (k) A testator sometimes adds qualifications of an indefinite nature to the word relations *e.g.* poor or necessitous relations This addition gives discretionary power to the executor to select among the relations such as he thinks to be fit objects of charity (l) Near relations have the same meaning as relations (m) but nearest relations mean the next of kin to the exclusion of those who would have been entitled by representation (n) It has been held to mean the heir (o)

4 Family It is 'a word of the most loose and flexible description' (p) having various meanings (q) It may mean (1) the whole household including servants and lodgers (r) or (2) everybody descended from a common stock (s)

(a) *De Beaulieu v De Beaulieu* 3 H L C. 524 557, *Smith v Butcher* 10 Ch D 113 The testator's intention shall prevail *Re Stevens Trusts* 15 Eq 110

(b) *J. 1601, 29 7Ed*

(c) *Walter v Maunde* 19 Ves 424
Gower v Alnwick 2 Ves Sen 67 friends and relations

(d) *Greenwood v Greenwood* 1 Bro C C 35 n

(e) *Haynes v Mordaunt* 3 Bro C C 234

(f) *Re Reed* 36 W R 682

(g) *Grices v Rawley*, 10 Hare 63 (see cases cited)

(h) *Re Deakin*, (1874) 3 Ch 365
Se la Hore v Jull 1 1891 A C 34

(i) *Re Connel*, (1962) 2 Ch 316

(j) *Mohd v Ali*, 3 Ves 211;
Hilbert v Hilbert 15 Eq 372

(k) *Deane v Deane* 3 Ves 329;

Adney v Greatrex 38 L J Ch 414 It does not mean a husband
Bailey v Wright 18 Ves 49 or wife
Nichols v Savage 18 Ves 53

(l) *Gower v Alnwick* 2 Ves Sen 67, but in *Widmore v Woodroffe*, Amb 636 the Court observed the addition of the word 'poor' made no difference but in that case there was only one relation entitled under the Statute

(m) *Whithorne v Harris* 2 Ves Sen 527

(n) *Smith v Campbell* 17 Ves 40 but see *Bibby v Mangler* 10 Cl & F 215

(o) *Griffiths v Jones* 5 Pears 241

(p) *Green v Martin* 1 Dr 646

(q) *Patt v Clark* 3 Ch D 672

(r) *Blackwell v Hall* 1 Ves 176

(s) *Lucas v Collins* 2 Ves 637;

Swan v Tred 9 Eq 622

that is to say, all blood relations, or (3) children only (a), this is the primary legal meaning of the term (b), or (4) the heir or next of kin (c), or (5) the heir apparent (d), or (6) wife and children (e), or (7) blood relations or relations by marriage (f), or (8) descendants generally (g), but where there are children the term excludes the issue of such children (h), or (9) an illegitimate child treated and recognised as a child (i). A gift to the families of A and B goes to the children of A and B in joint tenancy (j). Being a term of such wide import the gift sometimes becomes void for uncertainty as the testator's intention cannot be discerned. Thus, where there was a gift to "my daughters, their husbands and families" the "words husbands and families" were rejected for uncertainty (k).

5. Nearest of kin. Nearest of kin by way of heirship has been construed to mean the person who on intestacy will be entitled to succession (l), the expression 'nearest heir' has also the same meaning (m).

6. Kindred. According to the Hindu law wife is kindred to her husband (n). For definition, see s. 24.

7. Next of kin. It is settled that a gift to the next of kin without more will be a gift to the nearest blood relations of the propositus in an ascending or descending line, and if there be more than one they take as joint tenants (o).

Relations by half blood are equally entitled with those of full blood but the testator may exclude some relations if he likes (p). Where the context so indicates illegitimate kindred may be included (q). The word does not include relation by marriage in English law, so a husband or a wife will be excluded (r) unless a contrary intention is shown in the will (s).

There is no representation, so the representative of a deceased relation who died before the testator is not entitled to a share (t). A gift 'to the next of kin of my late father and mother' was construed as a gift to the descendants of both (u), but may mean a gift to the nearest of kin of the husband and the nearest of kin of the wife living at his or her death respectively and the representatives of those

(a) *Barnes v. Patch* 8 Ves. 604, *Owen v. Penny*, 14 Jur. 359.

(b) *Pigg v. Clarke* 3 Ch. D. 672.

(c) *Griffiths v. Egan*, 5 Beav. 241, *Williams v. Williams*, 20 L. J. Ch. 280.

(d) *Doe v. Smith* 5 M. & Sel. 126.

(e) *Re Drew* (1899) 1 Ch. 336 but see *Re Hutchinson*, and *Tenant*, 8 Ch. D. 540.

(f) *Re Macleay* 20 Eq. 186.

(g) *Williams v. Williams* 20 L. J. Ch. 280.

(h) *Re Parkinson's Trust* 20 L. J. Ch. 224, *Burt v. Hellyer*, 14 Eq. 160.

(i) *Lambe v. Gimes*, 6 Ch. 597.

(j) *Gregory v. Smith* 9 Har. 708.

(k) *Robinson v. Waddelow*, 8 Sim. 134.

(l) *Robinson v. Waddelow* 8 Sim. 134.

(m) *Re Maher* (1909) 1 Ir. R. 70.

(n) *Dines v. Biral*, 39 C. 87, 11 I. C. 67.

(o) *Withy v. Mangles*, 4 Beav. 358 on app. 10 Cl. & F. 215, *Hallion v. Foster* 3 Ch. 505 (see cases cited in argument), but see *Downes v. Bullock*, 9 H. L. C. 1, on app. from 25 Beav. 54, *Bowden v. Griffiths*, (1909) 1 Ch. 385 (tenants in common).

(p) *Greeves v. Rawley* 10 Har. 63, *Re Fergusson's Will*, (1902) 1 Ch. 483.

(q) *Re Wood* (1902) 2 Ch. 542.

(r) *Bullock v. Downes* 9 H. L. C. 1, 20, *Garrick v. Lord Camden*, 14 Ves. 372, see *Dines v. Biral*, 39 C. 87.

(s) *Starr v. Newberry*, 23 Beav. 436.

(t) *Elmsley v. Young* 2 My. & K. 82, *Cooper v. Denison* 13 S. M. 290, *Dines v. Biral*, 39 C. 87; 15 C. W. N. 945.

(u) *Pycroft v. Gregory*, 4 Rem. 526.

who have died since the death of the testatrix (a) Where there was a gift "to my nearest of kin in the male line in preference to the female line," held, the sister was entitled as it was not the intention to exclude females altogether (b).

8 Time when the next of kin will be ascertained (c) The persons entitled are ascertained at the death of the testator (d), even where the gift to the next of kin is preceded by a life estate (e) The context may show that the testator intended the next of kin to be ascertained at some other time, when it will be ascertained at the time so indicated (f) As has been said, it may be the next of kin are to be ascertained at the time of the testator's death, or it may be that only those of the class surviving at a particular period will take (g). In case of a gift to the next of kin of a person who is dead at the time of making of the will (h), or who dies before the testator (i), the class comprises those living at the death of the testator.

9 Without any qualifying terms These words have been construed to mean that there must be nothing to qualify the bequest, in other words the bequest must not be conditional (j) The correctness of this view has been doubted and an opinion expressed that the words would more naturally refer to "heirs," etc., and this view is in consonance with English law (k)

10. Direct and Independent object of the bequest This clause has been added with a view to make it clear that the gift here is not to an individual but to a class so as to exclude the operation of the rule laid down in S 97 Therefore the words of the clause in the will containing the gift are ordinarily to be construed as words of purchase (l) and not as words of limitation of the gift to the person as under S 97 (m)

11. Leaving assets. The importance of these words in the section and in the illustrations lies in the fact that the gift being to a designated class and not to a person, it is not liable for the debts of the deceased person under S 325, who is accordingly deemed to have left sufficient assets for the payment of his debts The only question in case of a gift under this section is the determination of the class that is entitled to the gift (n)

94 (S. 81). Where a bequest is made to the 'representatives' or 'legal representatives' or 'personal representatives' or 'executors or administrators' of a particular person, and the

Bequest to "representatives," etc., of particular person

- (a) *Re Soper* (1912) 2 Ch. 467, above case distinguished
 (b) *Soper v Bradlee* 5 H L C 673 (1911, 89)
 (c) 5 H L 272 3
 (d) *Bullock v Downes* 9 H L C 1 12.
 (e) *Doe v Lewin* 3 East 278
 (f) *W v Springell* 4 Ch. 300.
 (g) *Soper v G. H. Ry. Co.* 19 Cl D 444
 (h) *Bank v Hill* (1910) 1 Cl 274.
 (i) *W v Springell* 4 D G. & S

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 (n) *Re Phillips Will* 7 Eq 131
 (j) *Pestoff v Akhurst* 212, 7 Dom L R. 207
 (k) *Dickal v Austerwanft* 25 1 C 481.
 (l) *Tyane v Waterford*, 1 D G. F & J 613; *Calder v Malcolm* 21 Grav 223
 (m) *Hight v Leigh* 15 Ves 364; *Lewis v Pusey* 16 11 & W. 733
 (n) See *Dickal v Austerwanft* 25 1 C 481

class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it.

Illustration.

A bequest is made to the "legal representatives" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and will apply it in the first place to the discharge of such part of A's debts as may remain unpaid. If there be any surplus B will pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.

1 The section. The section does not apply to the wills of Hindus, *etc.* The words in the section all primarily mean executors or administrators (a)

2 Representatives. The primary meaning of the word is executors or administrators (b), but the term is capable of being interpreted in any sense in which the court may be satisfied, from the whole context of the will that the testator intended to use it subject to the rule of construction, viz., that the onus lies on the party who insists on attributing to a term a meaning different from its primary legal meaning to show that the testator intended to use the term in such different sense (c). Where there is a gift to several persons who are related to each other or their representatives the latter term has been construed to mean descendants (d).

3 Legal representatives. These words primarily refer to executors or administrators (e) so also the words personal representatives (f). In case of a gift to A or his legal representatives it is highly improbable that the testator should intend that if the legatee mentioned in the will should die in his lifetime, the legacy should go to his executors or administrators as part of the legatee's general assets, and accordingly the term 'representative' in such context is construed to mean the next of kin (g), and even a wife may be included (h), but the improbability is not so great where the gift is not immediate (i).

4 Executors or administrators. Under a gift to a person or his executors or administrators, the executors or administrators get the gift in a fiduciary capacity, i.e. are entitled to it as part of the estate of the original legatee. If there be an intention to give a beneficial interest to the representatives, it will be construed to mean the next of kin, as it is most unlikely that the testator will have the intention of benefiting the executors or administrators of the legatee (j).

- (a) Co. Litt. 209 a, *Carbyn v. French*, 4 Ves. 418. *Stockdale v. Nicholson*, 4 Eq. 359.
- (b) *Re Ware* 45 Ch. D. 269, *Re Crawford's Trusts* 2 Dr. 230.
- (c) *Re Crawford's Trusts*, 2 Dr. 230.
- (d) *Slyth v. Monro* 6 Sim. 49, *Atherton v. Crowther*, 19 Beav. 449.
- (e) *Price v. Strange*, 6 Madd. 149.

- (f) *Saberton v. Sheels*, 1 Russ. & My. 587.
- (g) *Colton v. Colton* 2 Beav. 67, *Smith v. Palmer* 7 Hare. 225.
- (h) *Smith v. Palmer* 7 Hare. 225.
- (i) *Re Henderson* 28 Beav. 656.
- (j) *Smith v. Palmer*, 7 Hare. 225. *Colton v. Colton*, 2 Beav. 67. *Re Homer*, 37 Ch. D. 695.

section, it will be noticed that the first legatee takes a vested interest, but is liable to be divested on the happening of the contingency when the second legatee becomes entitled

3. Various meanings of a gift to A or B A bequest in form alternative may in fact have various meanings and consequently its legal effect will not be the same in all cases. As has been said by Jessel M R., (a), 'You cannot lay down *a priori* that the gift to A or B has any particular meaning, you must first of all know what A and B are. Thus, where a testator left the residue of his estate to his next of kin or heir, the gift was held void for uncertainty (b). But a similar clause in another will was held not to constitute an alternative bequest but to refer to one of the classes only (c). Again the word 'or' has been construed to mean 'and' (d). On the other hand an alternative bequest has been held to have been created by the word 'and' so that the word 'or' is not essential for the purpose (e). Further the word 'or' may mark the commencement of an independent gift and be in no sense substitutional (f). Lastly, a gift to A or B may be substitutional or alternative (g). Accordingly, it may be observed that although in many cases a gift to A or B is substitutional there is no authority for the broad proposition that such a gift in a will is *prima facie* to be so treated (h). A gift to A or his issue, however, is *prima facie* substitutional (i) and if A stand for a class the issue of any member of such class surviving at the period of distribution take *per stirpes* (j). 'It is agreed that the words 'or his heirs, following a gift to a legatee, create a conditional institution' (l).

4. Alternative or substitutional gifts There is a distinction between an alternative and a substitutional bequest. 'Thus if the gift is to 'A or B' simply, this is an alternative gift, and as it seems, void for uncertainty, while if the gift is 'to A and B or C' it may be possible to construe it as intended to take effect in favour of C in the event of its falling as to B, in which case it is a substitutional gift as regards him (l). So if the gift is to A for life and after his death to A or his children the *prima facie* meaning is that if A survives the testator he takes a vested interest subject to be divested if he dies during his life time. Such a gift is called substitutional and not alternative. If, however, the second gift is not intended to divest the primary gift, but only to take effect in the event of its falling the second gift is called alternative. Thus in *Le Roberts* (m) a testator gave a share of his residuary estate to each of his two daughters, A and B for their respective lives and after their deaths their respective shares were 'to be equally divided between their respective children or

- (a) *Re Styles Trust* 5 Cl. D. 494
 (b) *Lownes v. Sone* 4 Ves. 649.
Longmore v. Broom 7 Ves. 124.
 (c) *Re Thompson's Trusts* 9 Cl. D. 637.
 (d) *Re Turner*, (1867) 2 Cl. 739.
 (e) *Re Cochrane* (1904) 1 Cl. 327.
Harvey v. Harvey 10 L.J. 343.
Cambridge v. Carter 25 N.L.J. 346.
 (f) *Re Broom* (1873) 1 Ch. 267.
 (g) *Wright v. Carter* 24 L.J. Cl. 481.
Wright v. Carter 22 Beav. 201.
Re De la Mare (1884) 2 Ch. 173.
Re De la Mare (1884) 2 Ch. 173.

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 (h) *Re De la Mare's Charitable Trust* (1897) 2 Cl. 163 (see cases cited in the argument). In this case A was construed to stand for a type and so to take in kind objects.
 (i) *Re Roberts* (1893) 2 Ch. 261.
 (j) *Re Coulton* (1905) 1 Cl. 320.
 (k) *Howe v. Howman* (1872) 4 Cl. 518.
 (l) *Re H. H. H. (1872) 1 Cl. 214* (substitutional gift).
 (m) *Carter v. Carter* 1 Cl. 215.
 (n) (1873) 2 Cl. 201.

legal representatives." A had several children all of whom predeceased her; it was held that the words "or legal representatives" had not the effect of a substitutional clause, but operated as an alternative gift to take effect only in the event of there being no child that took a vested interest, consequently the vested interest of A's children were not divested by their death in her life time (a).

97 (S. 84). Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest

Effect of words describing a class added to bequest to person.

of the testator therein, unless a contrary intention appears by the will.

Illustrations.

(i) A bequest is made—

- to A and his children,
- to A and his children by his present wife,
- to A and his heirs,
- to A and the heirs of his body,
- to A and the heirs male of his body,
- to A and the heirs female of his body,
- to A and his issue,
- to A and his family,
- to A and his descendants,
- to A and his representatives,
- to A and his personal representatives,
- to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(ii). A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(iii). A bequest is made to A for life and after his death to his issue. At the death of A the property belongs in equal shares to all persons who then answer the description of issue of A.

1. The section. The section does not apply to the wills of Hindus etc. It embodies a well known rule of English law regarding bequests of personality. A gift of immovable property to A and his heirs in English law creates an estate in fee simple and a gift to A and the heirs of his body an estate in tail, these words being the appropriate technical words of limitation of the respective estates. But in wills the use of technical words is not necessary, it being sufficient if the intention be clearly expressed. A devise of real property by will to A and his issue will be a gift to A in tail (b), the words 'issue' being taken as words of

(a) J. 1263 Ch. XXXVI 7 Ed., where the subject is exhaustively dealt with

(b) *Roddy v. Fitzgerald*, 6 H. L. C. 823, 879; *Re Lawrence*, (1915) 1 Ch. 129.

limitation, but these words have sometimes been construed as words of purchase (a). The rule in *Wild's* case (b) lays down that in case of a devise of real property to a person and his children, if he has no child at the time, he takes an estate tail, the word 'children' being regarded as a words of limitation, but if there be children, they take jointly with their parent by purchase. But in respect of bequests of personalty a different rule prevails (c). The general rule is that where personal property is given in terms that would carry the fee simple in land or would confer an estate tail in land, the gift is absolute and therefore devolves at the death of the legatee on his executors or administrators (d). The first taker in case of a bequest of personal property would in such case take an absolute interest whether there is a gift over in default of issue or not (e). The rule applies not only where an estate tail is expressly created but where it arises by implication (f), also where there is a gift of income only and not of land (g).

2 The rule. The section lays down the well known rule that a gift to A 'and his heirs' or 'the heirs of his body' are to be construed as words of limitation of the gift to A and the heirs or heirs of the body do not take by purchase unless otherwise intended. These words therefore enlarge the estate or interest of A and do not confer any estate or interest on the heirs or heirs of the body. Words of limitation mean words which describe the nature of interest conferred on a person. A gift to A and his heirs describe the interest of A, i.e., that it is a fee simple interest which is given to A; so, a gift to A and the heirs of his body means that it is a fee tail interest that is given to A. The heirs or heirs of the body are not "direct objects of a distinct and independent gift" i.e., they do not take by purchase but by descent. Acquisition by purchase means acquisition by any means other than by descent. Thus a gift to A and after his death to devolve on his children has been held to confer an absolute interest in A (h). Where a testator left property to his sons to be enjoyed by them from son to grandson it was held to be a grant of absolute property to the sons and their interests on their deaths passed to their representatives under the Hindu law of inheritance (i). Where a testator bequeathed the interest and profit of a fund to certain legatees and directed that 'the same shall be inherited by any child or children of them' held, it was an absolute gift to the legatees though the intention was to create an estate tail in the fund which could not be given effect to (j). A gift to a person to be enjoyed by him from generation to generation (k) or always and forever (l) is an absolute gift to the person. So also where there is a bequest to A and the heirs of his body

(a) *Morgan v. Thomas*, 8 Q. B. D. 575, affirmed on app. 9 Q. B. D. 643. W. 713 12 Ed.

(b) 6 Rep. 168; see the rule explained in *Skinner v. Durga* 31 A. 239. The rule has been abolished by the Real Property Act of England see also J. Ch. L.

(c) *Stokes v. Allen*, 12 Cl. & F. 161; *Burg v. Burg*, 10 H. L. C. 171, 178.

(d) *East v. East*, 19 Ves. 73; *Simmons v. Simmons*, 8 Sim. 22; *1st Walter*, (1798) 2 Ch. 703; *Agitation v. Bentley*, 8 L. J. 11, 143. W. 77 n. 12 Ed.

(e) *Re Andrew's Will*, 27 Bear 605; *Parkin v. Knight*, 15 Sim. 83.

(f) *Simmons v. Simmons*, 8 Sim. 22; *Walter v. Parr*, 26 Bear 236.

(g) *Re Andrew's Will*, 27 Bear 216.

(h) *Agnes v. Murray & Co.*, 79 I. C. 1026.

(i) *Yathirajulu v. Mukunthu*, 28 M. 353.

(j) *Adm. Genl. v. Money*, 15 A. L. J. 444, 457 B.

(k) *Rajah Chundranah v. Koor C. & L.*, 11 B. I. 11.

(l) *Muhammad v. I.*, 33 I. C.

in equal proportions (a), or to the children of A and their issue (b), A or the children of A, as are living at the testator's death, will take an absolute interest. In as much as the first taker in these cases gets the estate absolutely all ulterior bequests on the determination of the gift to him are void (c).

3. **Contrary intention.** The rule applies in the absence of a contrary intention (d), that is, where there is nothing in the will to show that the issue or the children were intended to be independent objects of the gift (e). When there is such contrary intention, the children or issue, etc., will take by purchase and an absolute interest will not vest in the first taker, he in fact gets no more than a life interest (f). The word 'issue' in connection with the gift of real estate is a word of limitation and creates an estate tail, but in connection with gifts of personal property may be a word of limitation, but, "whether it be so or not is purely a question of construction of each particular instrument, the Court which has to interpret such instrument being unfettered by any general rule" (g). Thus a gift to daughters of the testator and their respective sons was held to give a life estate to the daughter and a remainder over to the sons because of the presence of contrary intention (h). A gift of real estate to A and the issue of her body as tenants in common was held to confer only a life estate on A (i). The contrary intention must be indicated with reasonable certainty (j). It should be remembered, as stated in the last section (notes), that a gift to A and his issue has in some cases been construed as a bequest in the alternative, so that the issue will be entitled to take on failure of the gift to A (k).

4. **Gifts of heirlooms.** The rule with regard to heirlooms has been thus stated—"It is, in my opinion, clear, both on principle and on authority, that, where, chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitation of the settlement becomes entitled to the real estate for a vested estate of inheritance, whether in possession or in remainder, becomes absolutely entitled to the chattels" (l). Where there was a gift in these terms, "my intention being that the said diamonds shall descend as heirlooms so far as the rules of law and equity will permit", the words were held not to be evidence of contrary intention (m).

(a) *Re Baker's Trusts*, 52 L. J. Ch. 565.

(b) *Hodges v Harpur*, 27 L. J. Ch. 742 reversing 19 Beav. 479.

(c) *Hoare v Byng* 10 Cl. & F. 508, *Re Percy*, 24 Ch. D. 616.

(d) *Law v Thorpe*, 27 L. J. Ch. 649 (gift), *Parsons v Coke* 4 Dr. 296, *Re Stanhope's Trusts*, 27 Beav. 201.

(e) *Jefferison's Trust*, 2 Eq. 276, see *Re Dayrell*, (1904) 2 Ch. 496, *Bull v Comberbach*, 25 Beav. 540.

(f) *Radha Prosad v Ranimont*, 25 I. A. 118, 35 C. 896 reversing 33 C. 947. See *Skinner v Durga*, 31 A. 239 (not decided under the provisions of this section), *Skinner v Naunt*

Lal, 40 I. A. 105; 35 A. 211. *Re Couden*, (1908) 1 Ch. 320; *Adm. Genl. v. Money*, 15 M. 443, 467 B.

(h) *Radha Prosad v Ranimont*, 35 I. A. 118, 35 C. 896.

(i) *Doe v Burnsall*, 6 T. R. 30.

(j) *Re Parker* (1910) 1 Ch. 581.

(k) *Hurry v Harry* 10 Eq. 346, *Dick v Lacy* 8 Beav. 214, contra, *Young v Davis*, 2 Dr. & Sm. 167, see *Re Couden*, (1908) 1 Ch. 320.

(l) *Re Parker*, (1910) 1 Ch. 581, *fold in Re Batesford Hope*, (1917) 1 Ch. 287.

(m) *Re Hill*, (1902) 1 Ch. 807.

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(c) *Stokes v Heron*, 12 Cl & F 161 *Byng v Byng* 10 H L C 171, 178
(d) *Ellon v Eason*, 19 Ves 73, *Simmons v Simmons*, 8 Sim 22, *Re Walker*, (1908) 2 Ch 705, *Appleton v Rowley*, 8 Eq 139, 145 W 709 12 Ed

- (e) *Re Andrew's Will*, 27 Beav 609, *Parkin v Knight*, 15 Sim 83
(f) *Simmons v Simmons* 8 Sim 22; *Webster v Parr* 26 Beav 236
(g) *Re Andrew's Will*, 27 Beav 236
(h) *Agnes v Murray & Co*, 79 1 C 1026
(i) *Yethirajulu v Mukunthu*, 28 M. 363
(j) *Adm Genl v Money*, 15 M 443, 467 8
(k) *Rajah Chundranath v Koor Gouind Nath*, 11 B L R 86
(l) *Muhammad v, Fatima*, 8 A 39 P C.

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3. **Contrary intention.** The rule applies in the absence of a contrary intention (d), that is, where there is nothing in the will to show that the issue or the children were intended to be independent objects of the gift (e). When there is such contrary intention, the children or issue, etc., will take by purchase and an absolute interest will not vest in the first taker, he in fact gets no more than a life interest (f). The word 'issue' in connection with the gift of real estate is a word of limitation and creates an estate tail, but in connection with gifts of personal property may be a word of limitation, but, "whether it be so or not is purely a question of construction of each particular instrument, the Court which has to interpret such instrument being unfettered by any general rule" (g). Thus a gift to daughters of the testator and their respective sons was held to give a life estate to the daughter and a remainder over to the sons because of the presence of contrary intention (h). A gift of real estate to A and the issue of her body as tenants in common was held to confer only a life estate on A (i). The contrary intention must be indicated with reasonable certainty (j). It should be remembered, as stated in the last section (notes) that a gift to A and his issue has in some cases been construed as a bequest in the alternative, so that the issue will be entitled to take on failure of the gift to A (k).

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(d) *Law v Thorpe*, 27 L. J. Ch. 649 (gilt), *Parsons v Coke* 4 Dr. 296, *Re Stanhope's Trusts*, 27 Beav. 201.

(e) *Jefferson's Trust*, 2 Eq. 276, see *Re Dayrell*, (1904) 2 Ch. 496, *Bull v Combertach*, 25 Beav. 340.

(f) *Radha Prasad v Ranimont*, 25 I. A. 118, 35 C. 895 reversing 33 C. 947. See *Skinner v Durga*, 31 A. 239 (not decided under the provisions of this section), *Skinner v. Nand*

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(g) *Re Coulden*, (1908) 1 Ch. 320; *Adm. Genl. v. Money*, 15 M. 443 467 B.

(h) *Radha Prasad v Ranimont*, 35 I. A. 118, 35 C. 896.

(i) *Doe v Burnall*, 6 T. R. 30.

(j) *Re Parker*, (1910) 1 Ch. 581.

(k) *Hurry v Harry* 10 Eq. 346, *Dick v Lacy* 8 Beav. 214; contra, *Young v Davis*, 2 Dr. & Sm. 167, see *Re Coulden*, (1908) 1 Ch. 320.

(l) *Re Parker*, (1910) 1 Ch. 581, *fold in Re Bensford Hope*, (1917) 1 Ch. 257.

(m) *Re H.L.*, (1902) 1 Ch. 807.

5 Ascertainment of the class of children Where children take by purchase it is important to ascertain the class of children who are entitled to take the legacy The rule is that a devise or bequest to children as a class distributable at the death of some other person vests in all children in existence at the death of the testator, the gift however, opening so as to let in such afterborn children if any, as may come into existence before the period of distribution' (a)

6 Family The description family in a bequest of personalty (b), although it may comprise the same person as kindred or relations or even receive a still wider interpretation (c) yet primarily and independently of context showing the contrary will be read as meaning children (d) But according to the context (e) it has been construed to mean heir (f) or relations by marriage (g), or to include the wife (h)

7 Representatives A gift to A and his executors or to A and his representatives (see illust i) gives A an absolute interest (i) so that if A dies before the testator the legacy will lapse and cannot be claimed by his executors or administrators (j) So also a gift to A for life and then to his executors or administrators gives A an absolute interest (k) A bequest to A for life remainder to such persons as he shall appoint by will and in default of appointment to his executors or administrators gives an absolute interest to A (l) But an unmistakable intention that the executors are to take beneficially will confer on them a beneficial interest (m)

8 Illustration (ii) In this illustration the brothers take jointly with A although no contrary intention is indicated because a gift to brothers cannot enlarge the estate of A in as much as it cannot be construed as words of limitation of the gift to A A's estate will be enlarged only when the succession is limited to those who will be entitled to succeed on the death of A such as would be implied by the use of the words indicating the various classes mentioned in illust (i) The section is not happily worded as it does not bring out this distinction

9 Illustration (iii) Where a testator gave lands to A for life and after his death to the issue of his body with a gift over in default of issue it was held by the majority of judges that A got an estate for life but this decision was reversed on appeal and it was held A took an estate tail (n) This follows from the rule in *Shelley's case* (o) which is a rule of law and which lays down that

(a) *Browne v Hammond* John 210 cited in *Re Hulme* 76 L T 415

(b) As used for example in illustration (i)

(c) *Cruys v Colman* 9 Ves 323 see *Snow v Teed* 3 Eq 622

(d) W 727 12 Ed Pigg v Clarke 3 Ch D 672 *Re Terry's Will* 19 Beav 580

(e) See *Lamb v Lamb* 6 Cl 597 600

(f) *Griffiths v Egan* 5 Beav 241

White v Briggs 15 Sm 17

(g) *W Leroth v Bacon* 5 Ves 159

(h) *Blackwell v Bull* 1 Keen 176

(i) *Appleton v Rowley* 8 Eq 139

(j) *Williamson v Naylor* 3 Y & C. Ex 208

(k) *Acern v Lloyd* 5 Eq 393

(l) *Comb d'oe v Rous* 25 Beav 409 *Re Davenport* (1875) 1 Ch 361

(m) *Wallis v Taylor* 8 Sm 241

(n) *King v Mellish* 1 Vent 225 232

(o) 1 Rep 104 a

when by any gift or conveyance an ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the words 'heirs' or 'heirs of the body' are words of limitation of the estate of the ancestor. Illustration (iii) shows that this technical rule of English law has no application in this country (a), the rule has now been abolished in England

98 (S. 85) Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

Bequest to class of persons under general description only

1. The section. The section applies to the wills of Hindus, etc. It deals with the case of a gift to a class and states who are the persons entitled to take in such a case

2 What constitutes a class A gift is said to be to a class of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula and who, if they take at all, are to take one divisible subject, in certain proportionate shares (b) "*Prima facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator" (c), e.g., a gift to the children of A (d), or to the issue of A (e), or to the male offspring of A (f), or to my grandsons (g)

But it will be none the less a class because some of the individuals of the class are named, e.g., to all my nephews and nieces including A. Thus a gift to four named daughters and all after born daughters of a testator (h), or a gift to four named individuals and all sons and daughters who should be born afterwards and attain the age of 21 years (i), or to all my children including A and B (j) are all cases of gifts to classes. A gift will not cease to be a gift to a class because a member or two of the class is expressly excluded (k). There may also be a composite class, for instance, a gift to the children of A and the children B (l)

3 Testator's intention the decisive factor A collective formula or general description is not regarded as an unfailing test for the determination of a class. It has been said that whether a gift to a body of persons is a gift to them as a class or not depends on the intention of the testator (m). A person not a

(a) *Nand Kishore v Pasupati* 7 Pat 396, 108 I C 323

(b) *Peaks v Moseley* 5 A C 714

(c) *Kingsbury v Walter*, 1901 A C 187 192

(d) *Krushnatarao v Benabai*, 20 B 571

(e) *Soudaminy v Jogesh*, 2 C 262

(f) *Manjamma v Padmanabhayya*, 12 M 393

(g) *Cally Nath v Chunder Nath*, 8 C 378

(h) *Stanhope's Case*, 27 Beav 201,

Re Smith's Trusts, 9 Ch D 117.

(i) *Re Jackson*, 25 Ch D 162, *Kherodmoney v Daorgamoney* 4 C 455, *Ramlal v Kanai Lal*, 12 C 663

(j) *Shaw v Mac Mahon*, 4 Dr W. 31

(k) *Dmond v Boslock*, 10 Ch 358, *Re Cozens*, (1903) 1 Ch 138

(l) *Fletcher v. Fletcher*, 9 L. R. 11 301

(m) *Re Jackson*, 25 Ch D 162.

member of a class may form a member thereof if the testator so intend (a), on the other hand, a gift to a class such as to "my sons John, George and Thomas" has been construed as a gift to individuals (b). A gift to A and all the children of B is *prima facie* not a gift to a class (c), unless the testator so intends it (d). A gift to the testator's nephew A and the children of his sister was held to be a gift to a class (e) "It is a question in each case whether a designated person who is coupled with a class described in general terms is merged in that class or not" (f). A gift to the Maharani Sahiba has been held to be a gift to the senior Rani and not to a class there being two Ranis (g). But a gift to widows may imply a gift to a class as Hindus are permitted to have more than one wife at the same time (h). Therefore, a gift to persons described as standing in a certain degree of relationship to the testator but not comprehended in a common category may be a gift either to a class (i) or a gift to individuals (j), depending on the testator's intention.

In the absence of any indication of intention the question whether a gift is one to a class or not depends upon the mode of gift itself, namely, whether it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to receive in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons (k). Extrinsic evidence is not admissible to ascertain whether the testator intends to refer to a class or to an individual by the use of a particular term (e.g., 'Maharani Sahiba') (l).

4 Distinction between a gift to a class and a gift to an individual. A gift to a class implies an intention to benefit the class as a body, as a whole (the class is personified so to say), rather than the members constituting the body as individuals; but a gift to individuals described by a collective formula, though they may together constitute a class, implies an intention to benefit the individuals named (m). A class takes the gift as joint tenants, so that on the death of any member his share passes to the survivors (n), in case of a gift to individuals on the death of one before the testator his interest lapses and goes to the residue (o). Lastly, all the interests of all the members of the class must vest in interest at the same time

(a) *Fletcher v Fletcher*, 9 L. R. 11 301.

(b) *Re Whiston*, (1924) 1 Ch. 122, but see *Re Jackson*, 25 Ch. D. 162.

(c) *Re Chaplin's Trust*, 33 L. J. Ch. 183; *Re Allen*, 29 W. R. 480.

(d) *Drakeford v Drakeford*, 33 Bear 43; explained in *Kingsbury v Walter*, (1899) 2 Ch. 314 on app. (1901) A. C. 187.

(e) *Aspinall v Duckworth*, 35 Bear 307; cf. *Re Spiller*, 18 Ch. D. 614.

(f) *Rai Bishen Chand v Asmatda Koer*, 11 I. A. 164, 6 A. 560, 573 4 case of deed but told in cases of will.

(g) *Indar v Jaipal*, 15 C. 725 P. C.

(h) *Khimji v Morarji*, 22 B. 533.

(i) *Re Wood's Will*, 31 Bear 323; *Khimji v Morarji*, 22 B. 533.

(j) *Re Jackson*, 25 Ch. D. 162; *Adm. Genl v Money*, 15 M. 449.

(k) J. cited in *Krishnanath v Almaran*, 15 B. 543, where a right of residence given to A, his wife and children, was held not to constitute a class gift.

(l) *Indar v Jaipal*, 15 C. 725 P. C.

(m) *Barber v Barber*, 3 M. & C. 688; *Kingsbury v Walter*, (1901) A. C. (191) contra *Knight v Gould*, 2 M. & K. 295, but see *Re Maxwell* (1906) 1 I. 386.

(n) *Morley v Bird*, 3 Ves. 628.

(o) S. 105.

e.g., if there be a gift to A for life and afterwards to B and the children of C, the interest must be vested in the class at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C during the lifetime of the tenant for life. Where the class is to be ascertained on the death of the tenant for life and the interest vests in the class on the testator's death, the members take not as a class but as individuals (a).

5. Bequests held not to be gifts to a class. A bequest to A for life and after his death to be equally divided among his surviving children and his niece B (b), or a gift to the five daughters of A, or to "my nine children" (c), or a gift to certain named individuals and referred to as persons 'before mentioned' (d), or a right given to "my son in law A with his wife B and children to live in the house for ever" (e), are cases of gifts not to a class.

6. Ascertainment of a class. In case of a general gift, those members only take who answer to the description at the time of the testator's death (f); if the period of distribution be postponed, those coming into existence after the testator's death and before the period of distribution become members of the class and so are entitled to take (g). They could not however take under the wills of Hindus, etc. prior to the Hindu Disposition of Property Act (h). In case of a gift of a corpus subject to a condition there is a rule of English law which lays down that as soon as the condition is removed with reference to any member of the class, the whole class becomes entitled to take (i), this rule does not apply to gifts of income (j). In case of a gift of a specific amount, a person who is not a member of the class when the gift takes effect is not entitled to take (k).

Construction of terms

99 (S. 86). In a will —

(a) the word "children" applies only to lineal descendants in the first degree of the person whose "children" are spoken of;

(b) the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "grandchildren" are spoken of;

(c) the words "nephews" and "nieces" apply only to children of brothers or sisters;

(d) the words "cousins," or "first cousins", or "cousins-german", apply only to children of brothers or of sisters of the

(a) *Kingsbury v. Walter*, 1901 A.C. (194), *Drakeford v. Drakeford*, 33 Beav. 43, 48.

(b) *Drakeford v. Drakeford*, 33 Beav. 43.

(c) *Re Smith's Trust* 9 Ch. D. 117, *Re Stansfield*, 15 Ch. D. 84.

(d) *Re Gibson* 2 J. & H. 656.

(e) *Krishnanath v. Almarum* 15 B. 543.

(f) *Crosland v. Holliday* (1898) 1 Ch. 227.

(g) *Re Mervin*, (1691) 3 Ch. 197, *Blackman v. Fysh*, (1892) 3 Ch. 209.

(h) *Mangaldas v. Tribhuvandas*, 15 B. 652.

(i) *Re Emmet's Estate*, 13 Ch. D. 434.

(j) *Re Delo He*, (1919) 1 Ch. 209; *Re Chartres*, (1927) 1 Ch. 466.

(k) *Rogers v. Mulch*, 10 Ch. D. 25. See S. 111 note.

father or mother of the person whose "cousins," or "first cousins," or "cousins-german," are spoken of ;

(e) the words "first cousins once removed" apply only to children of cousins-german, or to cousins-german of a parent of the person whose "first cousins once removed" are spoken of ;

(f) the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of ;

(g) the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of ;

(h) words expressive of collateral relationship apply alike to relatives of full and of half blood ; and

(i) all words expressive of relationship apply to a child in the womb who is afterwards born alive

1. **Change** The words 'of the person whose children are spoken of' at the end of clause (a) did not occur in the Act of 1865.

2. **The section.** The section does not apply to the wills of Hindus, *etc* It gives the meanings of certain words denoting relationship which are of frequent occurrence in wills. The meanings here given are the primary meanings of the words according to English law, where they have been used in other senses as well, the exact sense in each case being determined by the context and the surrounding circumstances of each particular case. The section, however, fixes the meanings of the terms, so they are not open to construction and cannot be varied by the context. The omission of the phrase, "in the absence of an intention to the contrary" which occurs in the next section is significant.

3. **Children.** The primary meaning of the word is issue of the first generation, but in English law the meaning might be displaced by the context (a). It may refer to the issue of any marriage (b) unless excluded by the context when children of the particular marriage indicated will take (c). It does not *prima facie* refer to grandchildren (d), but may do so in English law if the context or the circumstances of the case require it to refer to them or to other lineal descendants (e).

4. **Grandchildren** The term does not in English law ordinarily include great grandchildren but may do so if the context indicate (f)

- (a) *Boven v Lewis*, 9 A C 890, 897, *Gibson v Gibson* (1901) 1 Ch. 40
 (b) *Nash v Allen*, 42 Ch D 54
 (c) *Re Parrott*, 33 Ch. D. 274
 (d) *Re Coley*, (1901) 1 Ch. 40 (case of deed), *Afoor v Ratsbeck* 12 Sim. 123

- (e) *Re Smith* 35 Ch D 558, *Radcliffe v Buckley* 10 Ves 195, 201, *Pride v Cooks* 3 D G & J 252 275 9
 (f) *Earl of Orford v Churchill*, 3 V & B 59, *Hussey v Berkeley* 2 Eden 194,

5. Nephews and nieces. These words mean the children of brothers and sisters including those of the half blood (a) They do not refer to grand nephews and nieces (b) nor to the nephews or nieces of the wife or the husband (c).

6 Cousins, etc. The primary meaning of the term cousin is children of uncles and aunts (d) but in the absence of any such relation it has received a more extended meaning in English law (e) A gift to cousins means first cousins only (f) It may mean the wife of a cousin (g) A bequest to first cousins or cousins german does not include the descendants of a first cousin (h)

7. Second cousins. The expression means the persons who have the same great-grandfather and great grandmother (i) A gift to first and second cousins includes all persons within the degree of second cousin and therefore a first cousin once removed is included (j). Cousins and half cousins include first cousins, first cousins once removed and second cousins (k)

8. Issue Primarily the word means lineal descendants so as to include all who are in existence at the time of vesting of the gift (l) But the term is flexible in its meaning so that it may mean children or lineal descendants of any degree (m) The meaning will be confined to children where the context so requires (n)

9 Descendants The primary meaning of the word is the same as that of issue (o) but it requires a stronger context to confine its meaning to children (p).

10 Relations of full and half blood See S 27 (b) notes

11. Child in the womb See S 27 (c) notes "It is the general rule that a child *en ventre sa mere* (in the mother's womb) comes within the expression 'child or children,' and is included in a trust in favour of children whether described as children *in esse* (in existence) living at the death, begotten and to be begotten, begotten and born or any other similar way' (q)

100. (S. 87.) In the absence of any intimation to the contrary in a will, the word "child," the word "son," the word "daughter," or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate

Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate

(a) *Re Cozens* (1903) 1 Ch 138; *Re Blower's Trusts*, 6 Ch 351

(b) *Crook v Whitley* 7 D G. M & G 490, *Campbell v Bouskell*, 27 Beav 325, but see, *James v Smith* 14 Sim 214

(c) *Merrill v Morton*, 17 Ch D 382, *Re Fish* (1894) 2 Ch 83, *Re Green* (1914) 1 Ch 134

(d) *Stoddart v Nelson*, 6 D M & G. 68

(e) *Re Bonner*, 19 Ch D 201

(f) *Stevenson v Abingdon*, 31 Beav. 305

(g) *Re Taylor*, 34 Ch D 255

(h) *Sanderson v. Bayley* 4 My & Cr 56

(i) *Re Parker*, 15 Ch D 528, on app. 17 Ch D 262

(j) *Wilks v Bannister*, 30 Ch. D 512, W 709

(k) *Re Chester*, (1914) 2 Ch 580

(l) *Maddock v Legg*, 25 Beav 531, *Endycean v Archer*, 1903 A. C. 379

(m) *Re Brks*, (1900) 1 Ch 417.

(n) *Heasman v Pearce* 7 Ch 275; *Re Waugh* (1903) 1 Ch 744, *Re Clarke*, (1915) 2 Ch 301

(o) *Crossly v Clare* 3 Sw 320

(p) *Ralph v Carrick*, 11 Ch D 873

(q) *Crook v Hill* 3 Ch D 773, *Occleston v Fullalove*, 9 Ch. 147.

absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5 000 rupees

1. Change The words 'have effect' have been substituted for the word 'prevails' and the words 'clauses (a) to (d) of this section' have been substituted for the words 'the four last rules'

2 Section The section applies to the wills of Hindus *etc*

3 Intention The rules laid down in the section are apparently intended to apply where there is no internal evidence as to the testator's intention as is the case in English law (a). 'The intention is the clearest rule,' so where the intention, collected from the whole will is clear, it will prevail (b), this appears clear from illustration (iii), the legatee will be entitled to one sum of Rs 500 only if the second rule under which it comes, be strictly applied (See note 7)

4. Clause (a) As the same specific thing cannot be given twice over, the legatee must be content with one such specific thing only (c)

5 Clause (b) The legacy is not cumulative when mentioned twice in the same instrument and is of the same amount or quantity (d) Where two legacies are given to the same legatee the *prima facie* rule is that the testator intended to make more than one gift (e) Of course in the case of a specific gift effect cannot be given to this intention (cl a) When the gifts are of the same amount and contained in the same instrument the Legislature has adopted the simple rule of giving effect to one of the gifts Where a testator shows an intention to give both the legacies the legatee takes both (f) When, however, the legacies are unequal whether given by the same instrument or where the legacies (not being specific) are given by two instruments whether of equal or unequal amounts they are cumulative (cl d)

6. Clause (c). It contemplates (1) two legacies (2) to the same legatee (3) of unequal amount (4) by the same instrument In such a case the legatee takes both (g) The legatee is also entitled to claim both where the legacies are different in kind, e g, where there are gifts of a pecuniary legacy and of a share in the residue (h)

7. Clause (d) The rule has been thus stated — 'When a testator gives a legacy by a codicil as well as by a will whether it be more less, or equal to the same person who is the legatee in the will, speaking *simpliciter*, it is cumulative (i) But the legacies will not be cumulative if there be evidence

- (a) *Hooley v Hatton* 1 Bro C C 390 n, 2 W & T L C. 321 see illast (vii)
 (b) *Burkinshaw v Hodge* 22 W R 484 *Guy v Sharp* 1 M & K 589 603, *Re Segelcke* (1906) 2 Ch 301
 (c) *Sulist v Lawther* 2 Hare 424 432, *Duke of St Albans v Beauclerk* 2 Atk 636 The rule is stated in the same terms in W P 838
 (d) *Garth v Merick* 1 Bro C C 30 n, *Barclay v Hainright* 3 Ves. 462, *Holford v Wood*, 4 Ves

- 76 91 *Manning v Thesiger*, 3 M & K 29
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 (h) *Ledger v Hooker* 18 Jur 481, *Krikpatrick v Bedford* 4 A C 96
 (i) *Hooley v Hatton* 1 Bro C C 390 n, *Wyle v Wyle* 17 Eq 50, *Benson v Benson* 17 Ves 34; *Lee v Pain* 4 Hare 201, 215

of a contrary intention in the will. As has been observed, "where a legacy is given to the same party in each of two different instruments, a will and a codicil, or two codicils, *prima facie* you must treat them as two gifts. That is an obvious proposition. If the party has twice said he gives, he must be understood to mean to give twice; but, of course, there may be circumstances to show that the *prima facie* construction is not, in the particular case, the construction to be adopted" (a). Therefore, gifts by two instruments will not be cumulative but substitutional if there be internal evidence of intention of the testator. Thus, if by two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift (b). So also where the gifts by the later instrument are merely explanatory or a repetition of the gifts by the former (c), or where both gifts though of the same amount are made with the same motive (d) which, however, is to be distinguished from description (e), or where the gifts by the later instrument are to be read in substitution of those in the former (f), or where the testator has not been able thoroughly to revise his will (g), or where the later instrument is a mere copy of the former (h), or where the two instruments are duplicates of the same instruments (i), or where the same specific thing accompanies the two gifts (j), or where the gift of the same amount is made by two instruments executed on the same day (k), the legacy will be considered to be substitutional and not cumulative.

8. Number of Instruments. A Court of Construction is bound by the decision of a Court of Probate as to the number of testamentary instruments. If probate be granted as of a will and codicil they would be regarded as distinct instruments (l). But if probate has been granted as of one testament the instruments will be considered as such by a court of construction (m).

9. Substituted legacy. Where a legacy is given in lieu of or in substitution of another, the latter is subject to the same conditions and limitations as the former had been (n). Where a testator gave £20,000 to his daughter for life with remainder to her children to be vested at 21 or death under that age and by a codicil "instead of the £20,000" he gave £15,000 to his daughter for life with remainder to her children "or the survivors," held, that the gift by the codicil

(a) *Russell v. Dickson*, 4 H. L. C. 293, 304.

(b) *Hunt v. Beach*, 5 Madd 351, 358-9.

(c) *Moggridge v. Thackwell*, 1 Ves. 64; *Duke of St. Albans v. Beauchamp*, 2 Atk. 636. J. 1093-4.

(d) *Subse v. Lowther*, 2 Hare 424; *Wilson v. O'Leary*, 7 Ch. 448; aff'd 12 Eq. 522.

(e) *Roch v. Callen*, 6 Hare 531 (case of gift to a servant held to be cumulative); see *Wilson v. O'Leary*; 12 Eq. 522.

(f) *Kidd v. North*, 16 L. J. Ch. 116; *Re Bryan*, 1909 P. 125 J. 1095, 7 Ed.

(g) *Russell v. Dickson*, 4 H. L. C. 293.

(h) *Gillespie v. Alexander*, 2 Sim. & St. 145; *Whyte v. Whyte*, 17 Eq. 50. J. 1093, 7 Ed.

(i) *Re Mitchell*, (1929) 1 Ch. 552.

(j) *Curtis v. Pye*, 17 Ves. 462.

(k) *Whyte v. Whyte*, 17 Eq. 50.

(l) *Martin v. Drinkwater*, 2 Bear. 215; *Russell v. Dickson*, 4 H. L. C. 293.

(m) *Re Mitchell*, (1929) 1 Ch. 552.

(n) *Re Baden*, (1937) 1 Ch. 132, 149; *Re Bodington*; 25 Ch. D. 655.

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(j) *Curie v Pye* 17 Ves 462.

(k) *Whyte v Whyte* 17 Eq 50

(l) *Martin v Drinkwater*, 2 Beav 215. *Russell v Dickson* 4 H L C 293

(m) *Re Michell* (1929) 1 Ch 552

(n) *Re Boden* (1907) 1 Ch 132 149, *Re Boddington* 25 Ch D 685

was not substitutional so as to make the limitations of it similar to those in the will (a)

10. Admission of evidence As regards the admissibility of evidence to prove the testator's intention, it has been observed that evidence will be received in support of the apparent effect of the instrument and not against it. Where a presumption is raised against the apparent intention of a testamentary instrument, evidence will be received to repel that presumption. It has been held that parol evidence is not admissible to show that only one legacy was intended (b). In *Guy v. Sharp* (c), evidence of the testator's declaration as to his meaning and intention was not allowed, but that of the amount of the testator's property, of the circumstances of the family, etc., a knowledge of which would better help the court to understand the meaning of the testator, was admitted. In other words, the question is now regarded as one of construction of the meaning of the testator to be gathered from the language of the will and only such evidence will be admitted as will help the court to understand the language and the meaning of the testator (d).

102 (S. 89). A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Constitution of residuary legatee

Illustrations

(i) A makes her will, consisting of several testamentary papers, in one of which are contained the following words — 'I think there will be something left, after all funeral expenses, etc., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to'. B is constituted residuary legatee.

(ii) A makes his will, with the following passage at the end of it — 'I believe there will be found sufficient in my bankers' hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure'. B is constituted the residuary legatee.

(iii) A bequeaths all his property to B, except certain stocks and funds which he bequeaths to C. B is the residuary legatee.

1 The section The section applies to the wills of Hindus etc.

2. Meanings of residue, residuary legatee The word residue is a relative term. The meaning attached to it by the testator and the subject matter with reference to which the word is used have to be gathered from the context of the will. Thus the word may have exclusive reference to a particular fund or other property and may not mean the residue of the testator's general estate (e).

(a) *Haley v. Bannister*, 23 Beav. 336.
(b) *Hunt v. Beach* 5 Madd. 351, *Re Shields* (1912) 1 Ch. 591.
(c) 1 M. & K. 559.

(d) See *Tatham v. Drummond*, 33 L. J. Ch. 438.
(e) *Higgins v. Dawson* 1902 A. C. 1, reversing (1900) 2 Ch. 756.

It has however been observed by Sir G Jessel, M R (a) that it is not a true residue if there is some part which is not disposed of by the will to anybody at all. But this view has been criticised and it has been stated that if this means that there can be "only one residuary devise in a will," or it must be of a "universal character," it has been overruled. There may well be two residuary gifts in a will (b).

Under a residuary gift in this country the legatee is entitled to both movable immovable properties (c). A residuary gift may be expressed in various forms (see below), but however it is expressed the effect must be, it has been said, that it shall be intended to comprise all which is not disposed of by the will (d). The meaning of the expression 'residuary legatee' must be fashioned and moulded by the context and a residuary legatee may under a particular context be entitled to the whole of the undisposed of estate of the testator (e).

3 How constituted No particular words are necessary to constitute a residuary gift provided the intention is clearly expressed of paying the nett surplus of the estate to the person named. The nett surplus means, and that is the technical meaning of the word 'residue,' what remains after payment of the debts funeral and testamentary expenses, all costs of the administration of the estate of the testator and the legacies bequeathed by the will, to which effect can be given (f). The following words and expressions have been held sufficient to constitute good residuary bequests (g) —(i) rest or residue (h), (ii) remainder (i), (iii) other (j), (iv) not hereinbefore otherwise disposed of (k), (v) etc (l), (vi) all I am worth (m), (vii) everything else I do possess of (n), (viii) something left I give (o), (ix) after these legacies and doctors bills and funeral expenses I leave to (p), (x) all that remain (q), (xi) what is left (r), (xii) should there be any surplus (s). Where a testator bequeaths pecuniary legacies and also gives all the real and personal estate to which at his death he shall be entitled in one mass, he obviously means the residue. The words rest and residue are not necessary (t). The mere mention of certain articles does not make the gifts specific, for the clause containing the names may be an enumeration of the particulars of which the residue consists of (u). A residuary gift was held to arise

(a) *Blight v Hartnoll*, 23 Ch D 218

(b) *Re Mason* (1901) 1 Ch 619 add 1903 A C 1, *Higgins v Dawson* 1902 A C 1

(c) *Mun Mohun v Purushnath* 22 W R 174

(d) *Kanindra v Adm Genl* 6 C W N 321, 325. See *Monorama v Kali Charan* 31 C 166 172 (what passed under the residuary clause in the will)

(e) *Singleton v Tomlinson*, 3 A C 424

(f) *Trethewy v Helsar* 4 Ch D 53

(g) See W 995 b.

(h) *Allree v Allree* 11 Eq 280, *Re Mason*, (1901) 1 Ch 619. *Monorama v Kali*, 31 C 166, *Re Emerson* (1929) 1 Ch 125

(i) *Re Cadogan* 25 Ch D 154

(j) *Re Mason* (1901) 1 Ch 619

(k) *Lancefield v Iggulden*, 10 Ch 136

(l) *Chapman v Chapman*, 4 Ch D 800

(m) *Huxley v Brooman*, 1 Bro C C 437

(n) *Wilce v Wilce* 7 Bing 664

(o) *Leighton v Baillie*, 3 M & K 267

(p) *Re Bassett's Estate* 14 Eq 54

(q) *Re Ruston* 22 Bom L R 355,

Re Egan (1897) 1 Ch 688

(r) *Re Douglas* (1955) 1 Ch 279

(s) *Dyakanath v Burdett* 4 C 443, see *Ashchah v Durga* 6 L A 182 5 C 438

(t) *Re Bala* (1907) 1 Ch 791

(u) *Taylor v Taylor* 6 S a 245

has been expressly disinherited, if any disposition prove ineffective, then an intestacy arises and the heir will succeed according to the law (a). He is not fettered by any restriction that the testator chooses to impose upon any property not effectually disposed of by him (b)

104 (S. 91). If a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

Time of vesting
legacy in general
terms

The section The section applies to the wills of Hindus, etc. It states the time of vesting of interest in a legacy given in general terms, i. e., when the testator does not specify any time for its payment. In such a case the section declares the interest to vest immediately on the death of the testator. This follows from the ambulatory character of a will (c). A will takes effect on the death, and only on the death, of the testator. Until that event no legatee acquires any right in the property of or has any claim against the testator. This is not peculiar to wills. For it may be said generally of an instrument purporting to make a gift of property that such attempted disposition conveys no interest to the object of the gift unless the instrument takes effect. As has been observed, "property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As therefore, a will takes effect on the death of the testator, it follows that any devise or bequest in favour of a person in esse simply (i. e., without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest" (d).

Although an interest in a legacy becomes vested on the death of the testator, it does not follow that the right to claim possession or payment of the legacy also arises on the same day, for the enjoyment thereof may be postponed by the testator. Such postponement of possession or enjoyment, however, does not necessarily prevent the vesting of the legacy (e) though it may do so (f). Even where enjoyment or possession is not postponed by the testator, an executor is not bound to pay any legacy within 12 months of the death of the testator, therefore it is not the legacy but the interest in the legacy which is vested on the testator's death (g). Nevertheless the rule remains true, that a bequest, unless the testator intended otherwise, as in the case of a contingent bequest, becomes vested in interest in the devisee or legatee from the date of

- (a) *Erasha v. Jeral*, 4 B 537 *Tagore*
case, 9 B L. R. 377
(b) *Gokool v. Isur*, 14 C. 222.
(c) See J. 393 7 Ed
(d) *Garthshore v. Chalie*, 10 Ves. 1,
13
(e) See S. 119, *Gosarl v. Rivell Carnac*,

- 13 B 463
(f) See S. 120, *Ballin v. Ballin* 7 C.
218, *Kaikhushru v. Shrinibai*, 45
I A 257
(g) S. 337, *Bachman v. Bachman* 6
A 583, *fold in Lakshamma v.*
Ratnamma 38 M 474

the testator's death although he may not be entitled to receive what has been bequeathed to him except in due course of administration (a) A vested interest, therefore arises even though the right of enjoyment or the right to claim possession be deferred (b)

A vested interest The use of word 'vest' is unfortunate. It may mean as it does in the section the vesting of interest in a legatee and this meaning is to be preferred (c) or it may mean 'vesting in possession', which may take place on a date subsequent to the death of the testator (d) A clear intention will outweigh the technical meaning (e)

Effect of vesting The importance of the rule lies in the fact that a vested interest is transmissible. Therefore whether on death of a legatee after the testator his interest passes to his heirs or not depends on the fact whether the interest conferred on him by will is vested or not (f) It is possible for a Muhammadan testator to create a vested interest similar to a vested remainder under English law and such an interest can be attached and sold (g)

105 (S. 92). (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator

Illustrations

(i) The testator bequeaths to B 500 rupees which B owes me. B dies before the testator. The legacy lapses.

(ii) A bequest is made to A and his children. A dies before the testator or happens to be dead when the will is made. The legacy to A and his children lapses.

(iii) A legacy is given to A and in case of his dying before the testator to B. A dies before the testator. The legacy goes to B.

(iv) A sum of money is bequeathed to A for life and after his death to B. A dies in the lifetime of the testator. B survives the testator. The bequest to B takes effect.

(v) A sum of money is bequeathed to A on his completing his eighteenth year and in case he should die before he completes his eighteenth year to B. A completes

(a) *Adusupatti v Swami* 22 M. L. J. 228. *Srirangammal v Sendammal* 23 M. 216 explained.

(b) *Rewun Persad v Radha Beeby* 4 M. L. A. 137. See *Kakhuhr v Shrinibai* 20 Bom. L. R. 130 P. C. 45 L. A. 257.

(c) *Richardson v Power* 19 C. B. N. S. 780.

(d) *Berkeley v Swinburne* 16 Sim. 275.

Wordsworth v Wood 1 H. L. C. 129.

(e) *Williams v Haythorne* 6 Ch. 782. *Barnet v Barnet* 29 Beav. 239. *Re Wrightson* (1904) 2 Ch. 95.

(f) *Blaso v Kunni* 33 A. 558.

(g) *Banoo Begum v Mir Abed* 32 B. 172. See *Adusupatti v Swami Pillai* 22 M. L. J. 228.

his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(vi) The testator and the legatee perished in the same ship-wreck. There is no evidence to show which died first. The legacy lapses

1. **The section.** The section applies to the wills of Hindus, etc. The last section deals with the case of a legatee surviving the testator but dying before payment thereof. In such a case the section declares that the legatee has a vested interest (if the time of payment be not specified by the testator) which is transmitted to his heirs. This section deals with the case of a legatee who does not survive the testator and says that in such a case the legacy cannot take effect but shall lapse and shall fall into the residue. The representatives of a legatee therefore to be entitled to a legacy must prove that he survived the testator. Where the sole legatee dies there will be intestacy (a).

This rule also follows from the ambulatory character of a will. Just as a legacy cannot vest in a legatee before the death of the testator (b), for the same reason a legatee cannot take any interest in a legacy unless he survives the testator. The failure of a legacy to take effect in such a case is called 'lapse'.

2 **Lapse** The word means the failure of a legacy to take effect on account of the death of the legatee before the testator or at the date of the will (c), or for some other reason (d). Parol evidence is not admissible to show that the testator knew of the legatee's death (e). Lapse is not prevented by confirmation of the gift by a subsequent codicil (f).

3 **Where lapse takes place** The doctrine of lapse applies in case of death or total loss of object of the gift (g). A gift of an absolute estate will lapse by the death of the legatee in the lifetime of the testator (h). Where there is a gift to a particular charitable institution which ceases to exist before the testator's death, there is lapse (i), but not where it ceases to exist after the testator's death (j). Where there was a legacy left to a school and between the date of the will and that of the testator's death the day school was discontinued and only the Sunday school was continued, *held*, the legacy did not lapse as there has not been a total loss (k). A gift to A or his executors or representatives will lapse on the death of A before the testator (l). The rule applies to executory gifts (m).

4 **The doctrine applies to powers of appointment, &c.** Thus where a testator gives his widow a life estate with power to appoint among his children, *held*, the widow could appoint only in favour of the testator's children

(a) *Erasha v. Jethal*, 4 B 537.

(b) See last S. Note

(c) *Elliot v. Davenport*, 1 P. W. 83

(d) *Camant v. Barefoot*, 26 M 433
(legatee was an attesting witness)

(e) *Maybank v. Brooks*, 1 Bro C C 84

(f) *Hutcheson v. Hammond*, 3 Bro C 128

(g) *Re Rymer*, (1895) 1 Ch. 19

(h) *Goodright v. Wright*, 1 P. W. 396,
Re Whorwood, 34 Ch D 446

(i) *Fisk v. All Gent*, 4 Eq 521,
Re Rymer, (1895) 1 Ch 19

(j) *Shelin v. Hepburn*, (1891) 2 Ch. 236

(k) *Re Waring*, (1907) 1 Ch. 166

(l) *Elliot v. Davenport*, 1 P. W. 83,
Corbyn v. French, 4 Ves 418, 435
Leach v. Leach, 35 Beav 185

(m) See W. 788 *Colthorpe v. Gough*,
3 Bro C C. 993 and *Humberston v. Stanton*, 1 V. & B 384, cited

who were alive at her death (a) On the donee of a power dying before the donor there will be a lapse if the power be created by will (b) Where there is a direction to purchase an annuity after the death of a tenant for life, or the death of the annuitant before the tenant for life the gift lapses (c) A legacy of a debt due to the testator lapses on the debtor's death before the testator (d)

5 Where there is no lapse Where a testator gives the legal estate to A but the beneficial interest to B, on the death of A the interest of B does not lapse. Conversely, on the death of B the legal estate in the hands of A does not lapse (e) Similarly, in case of a gift to a legatee charged with the payment of a sum to another, there is no lapse of the sum charged with payment by reason of the death of the legatee before the testator (f), but on death of the person who was to receive the sum the gift to the legatee becomes absolute (g) In case of a legacy to a debtor if it be in discharge of an obligation then there is no lapse by reason of the debtor's death before the testator (h) A gift over in default of appointment does not lapse by the death of the donee of the power in donor's lifetime (i) There is no lapse also in case of a substitutional gift, the person indicated will take by substitution (j) This is however a question of construction of the testator's intention (k) A legacy is also prevented from lapsing in certain special cases which are dealt with in the following sections (106 109 111)

6 No presumption of survival "There is no presumption in law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause (e.g., by ship wreck) nor is there any presumption of law that all died at the same time The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one the law will treat it as a matter incapable of being determined The *onus probandi* is on the person asserting the affirmative (l) There is no presumption of law in favour of continuance of life (m) Therefore where legatees have disappeared and have not been heard of the onus lies on the party alleging that he survived the testator to prove it (n) "The true proposition is that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence" (o)

7 Contrary Intention The rule has been thus stated It is "quite clear, that a testator may prevent a legacy from lapsing, but the authorities show that in order to do that he must do two things, he must, in clear words, exclude lapse,

- (a) *Freeland v Pearson* 3 Eq 658.
Re Brookman's Trusts, 5 Ch 182
- (b) *Jones v Southall* 32 Beav 31.
Re Young (1920) 2 Ch 427
- (c) *Re Draper's Trust*, 36 W R 783
- (d) *Maitland v Adair* 3 Ves 231.
Elliot v Davenport, 1 P W 83
(but see below)
- (e) *Doe v Edlin*, 4 Ad & El 582
- (f) *Re Kirk*, 21 Ch D 431
- (g) *Fisk v Alt Genl*, 4 Eq 521
- (h) *Stevens v King* (1904) 2 Ch 30
(see cases cited). *Re Greenwood*,
(1912) 1 Ch 392

- (i) *Wing v Angrave*, 8 H L C 183.
Williamson v Farwell, 35 Ch D, 128.
- (j) *Re Porter's Trusts* 4 K & J 188.
Gillings v M Dermott, 2 M & K 69
- (k) *Barraclough v Cooper*, (1908) 2 Ch 121
- (l) *Wing v Angrave*, 8 H L C 183
- (m) *Re Phene's Trusts*, 5 Ch 139.
Re Rhodes, 36 Ch D. 586
- (n) *Re Benjamin* (1902) 1 Ch 723
- (o) *Re Phene's Trusts*, 5 Ch 139
under the Law of Property, Act,
1925, 15 Geo V c 20, s 187
the Court will presume that the
younger survived the elder one

he must clearly indicate who is to get in case the legatee should die in his life time' (a). A mere declaration by the testator against lapse is not enough (b). But lapse is prevented by a testator providing a substitute in case of a legatee dying in his lifetime (c). Where a testator gave the residue to his widow for life and afterwards to fifteen designated persons 'or their executors, administrators or assigns' and "to be absolutely vested" on the testator's death and to be payable at 21, *held*, there was nothing to shew that the executors, *etc.*, were to take as designated persons if the legatees died in the testator's lifetime, the word 'or' simply did not prevent lapse (d). But generally speaking the word 'or' implies substitution and therefore prevents lapse (e). Where a testator expressly directed that neither his wife nor his daughter would have any share in his property and bequeathed the whole of it to his brother, who however predeceased the testator, *held*, there was lapse and the daughter or widow was not excluded from succession as on an intestacy (f). In case of a bequest to A and in case of his death to his executor or heirs the latter gift does not fail in case of death of A in the testator's lifetime (g).

106. (S. 93). If a legacy is given to two persons

Legacy does not lapse if one of two joint legatees die before testator

jointly, and one of them dies before the testator, the other legatee takes the whole.

Illustration.

The legacy is simply to A and B. A dies before the testator, B takes the legacy.

1 The section. The section applies to the will of Hindus, *etc.* It states that the interest of a joint tenant in case of his death before the testator does not lapse but passes to the survivors.

2 Characteristics of a joint tenancy. A joint tenancy is characterised by four unities, (1) unity of possession, no one is entitled to any exclusive part but each takes the whole with the rest, (2) unity of interest, the interest of all must be the same, a tenant in fee simple cannot hold jointly with a tenant in tail, (3) unity of title, the interest of all the tenants must be created by the same instrument; (4) unity of time, the interest of each tenant must arise at the same time, but this unity need not be present in the case of a gift by will (h). There is another characteristic of a joint tenancy, namely, survivorship. Where a gift is made jointly to several, on the death of one his interest neither lapses nor passes to his representatives, but the survivors become entitled to it. So when a devise in fee simple is made jointly in favour of A, B, C and D, it is the heir of the last survivor

(a) *Brown v Hope* 14 Eq 343, *Gittings v Mc Dermott*, 2 M & K 69; *Re Smith*, (1916) 2 Ch 369. see *Camant v Dartfoot* 26 M 433.

(b) *Pickering v Stamford* 3 Ves, 492.

(c) *Re Greenwood* (1912) 1 Ch 392.

(d) *Leach v Leach*, 35 Beav 185.

(e) *Salisbury v. Pelly*, 3 Hare 86;

but see *Re Whitrod* (1926) 1 Ch 118.

(f) *Erasha v Jerbal* 4 B 537.

(g) *Long v Watkinson* 17 Beav 471; *Hemilton v Todhunter*, 22 L J Ch 76, but see *Re Valdez's Trusts* 40 Ch D 159.

(h) See *Vydinada v Nagammal*, 11 M. 258.

that is entitled to the whole interest to the exclusion of all others (a) It is only after severance, when the joint tenancy cases, that the survivors will cease to take the interest of a coparcener on his death which will then pass to his heirs (b). The rule that in the case of a joint tenancy the interest of a tenant passes to the survivors is not confined to the case of the death of that tenant The failure to take may be due to the revocation by a codicil of the gift or to its invalidity (c) As has been said by the Privy Council (d) "If an estate is limited to two jointly, the one capable of taking the other not, he who is capable of taking takes the whole"

3. **Unity of time** In the case of gifts by wills, the rule that all the joint tenants must derive their interest at the same time has no application, but the nature of the interest must be the same for all (e) Thus in case of a gift to A and on her death to all and every her child and children, etc., the latter take as joint tenants though the interest of the various members do not commence at the same time (f), but if the gift were to the children of B on attaining 21, there would have been a tenancy in common because the interest of all would not have been the same, those completing 21 would get a vested interest while those under 21 would have a contingent interest (g) The fact of vesting at different times may however be regarded as an indication of a tenancy in common (h)

4. **Presumption of joint tenancy.** In *Crooke v De Vandes* (i), Lord Eldon stated that a simple bequest of a legacy or a residue without more created a joint tenancy and the onus lay upon the other party to shew from the context that the words are not to have their legal operation In *Morley v Bird* (j), a testator gave to his daughter a life estate in properties left by him, 'on condition that she do pay to the four daughters of my brothers John Collins four hundred pounds out of the seven now lying in the 3 per cent Consolidated' Only one of the four nieces of the testator survived him and she was held entitled to the whole amount It was observed that an interest given to two or more by way of a legacy or otherwise, unless there are words of severance, e.g., 'equally to be divided, equally among, between' creates a joint tenancy Thus, where a gift was made of a certain fund in favour of A and B and the children of C in equal shares, these words, it was held, made them tenants in common (k) The words 'share and share alike' do not necessarily constitute a tenancy in common with all the incidents attached thereto in English law (l) The tendency of the court now however is to lean against joint tenancy specially in the construction of a will (m)

- (a) *Buffar v Bradford*, 2 Atk 220
 (b) *Webster v Webster* 2 P W 347
 (c) *Humphrey v Tayleur* Amb. 136, *Dowsett v Sweet* Amb 175, *Young v Darles* 2 Dr & Sm 167
 (d) *Hand Singh v Sila Ram*, 161 A 44 16 C. 677
 (e) *Macgregor v Macgregor* 1 D G F & J 63, *Kerworthy v Ward*, 11 Hare 195
 (f) *Morgan v Britten*, 13 Eq 25
 (g) *Macgregor v Macgregor* 1 D G F. & J 63
 (h) *Hand v North*, 10 Jar N. S. 7.
 (i) 9 Ves. 197, 204; see *Morgan v*

- Britten* 13 Eq 18; *Re Binning* 1895 W N 116; *Jalram v Kurchat* 9 B 491, 509
 (j) 3 Ves. 625; see *Stuart v Bruce* 3 Ves. 632.
 (k) *Adm. Genl. v Money*, 15 M. 445 459
 (l) *Lakshmi v Ganpat*, 4 Bom. H. C. R. 161 on app 5 Bom H. C. R. 135, cited in *Jalram v Kurchat* 9 B 491, 510; *Jones v Hall*, 16 Sim 50
 (m) *Lakshmi v Harad*, 11 B 69, 77 an o.p. 573, *Acem'v Penabul*, 23 B. 61 92.

The rule is subject to the intention of the testator and therefore from the context a gift may be construed as a tenancy in common although the testator has used the word 'jointly or 'survivor' (a) Thus the bequest of an annuity equally to be divided between A and B during their joint lives or the life of the survivor of them was construed from the context to be a gift to them as tenants in common (b) But where a testatrix gave to A and B a sum in Long Annuities to be equally divided between their lives, after which the sum was to go to C, held, A and B took as joint tenants and C took on the death of the survivor of A and B (c)

The rule applies to gifts to two classes (d) There may be a joint estate followed by a tenancy in common (e)

5 No presumption of joint tenancy in Hindu law and no survivorship 'The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenery between the members of an undivided Hindu family.' It is not proper to import into the construction of a Hindu will an extremely technical rule of English conveyancing (f) This means that the rule of English law that a joint tenant's interest does not descend to his heirs is not properly applied to a bequest in joint tenancy under a Hindu will (g) In other words the natural presumption is that the legatees were intended to take in equal shares and when the estate is one of inheritance, it is far more reasonable to suppose that the testator's intention was to make each legatee and his heirs the objects of his bounty than that the heirs should be deprived and the heir of the last surviving legatee only should take the whole (h) Accordingly, it has been observed (i) that "the question for determination is but one of intention to be ascertained with reference to the terms of the particular will. If the grant is to persons who are incapable of forming a Hindu joint family then they can of course take only as tenants in common. If, on the contrary, the grant is to persons who constitute such a family, even then it may be that the *prima facie* view is that they take in severalty and that those who argue in favour of the opposite construction have to show some clear foundation for it in terms of the will.' In cases of provisions for maintenance for two persons the presumption

(a) *Cookson v Bingham*, 17 Beav 262, *Booth v Alington*, 27 L. J. Ch 117.

(b) *Bryan v Twigg*, 3 Eq 433

(c) *McDermott v Wallace* 5 Beav 142, *Bridge v Yates*, 12 Sim 645 (original legatees held as tenants in common, but substituted tenants jointly).

(d) *Wood v Wood*, 3 Hare 65 (family), *Baker v Gibson* 12 Beav 101 (next of kin); but see *Re Nightingale*, (1909) 1 Ch. 385, *Re Carless* 1 Ch. D 460 (issue).

(e) *Cook v Cook* 2 Vern 545, *Edwards v Champion* 3 D. G. M. & G 202 (joint estate for lives with separate inheritances), *Re Atkinson*, (1892) 3 Ch. 52 (severance

among heirs indicated by context), *Tufnell v Borrell*, 20 Eq 194 (devise to several in tail who could not intermarry).

(f) *Jogeswar v Ram Chund*, 23 C 670 679 P C overruling *Vyadinada v Nagmmal* 11 M 528 See S 107 n 6

(g) *Navroji v Peralal*, 23 B 80 99

(h) *Bhoba Tarini v Peary Lal* 24 C. 646 1 C W N 378, *Bal Divali v Patel*, 26 B 445 443, *Goff v Jaldhara*, 33 A 41, 7 A L J 941, *Kishori v Afundra* 33 A 665, 8 A L J 757

(i) *Yethirajulu v Mukunthu*, 28 M 363, 15 M L J 229 see next S note

of joint tenancy does not arise, but *prima facie* upon the death of one the other will be entitled to a proportionate amount (a), but where there are indications of a contrary intention the gift will be a joint one (b). Again, a gift apparently of maintenance may, in fact, be a gift of an absolute estate of inheritance in equal shares to the legatees (c).

It does not follow that under no circumstances can a joint tenancy arise in case of Hindus. All that the above authorities lay down is that the presumption is against joint tenancy and the court will lean against such a construction. The section itself is clear and it actually recognises a joint tenancy with the right of survivorship (d). Accordingly on construction of the wills joint tenancies with the incident of survivorship has been recognised in the cases cited below (e), whereas the gifts have been construed as creating tenancies in common in the other cases noted below (f). The law on this point is clearly stated in a short judgment in *Bai Diwali v Patel* (g) — (i) By Hindu law a gift by will would be treated as self-acquired property and therefore in the absence of any direction would pass to his heirs. (ii) The principle of joint tenancy is unknown in Hindu law, except in the case of coparcenery between members of an undivided family. (iii) The donor can limit the interest of a donee by giving an interest by way of survivorship to any other person living at the time of his death. (iv) Among Hindus, in case of a joint gift there is no presumption of survivorship. (v) Among Hindus in the absence of an intention to the contrary, each donee takes an interest which passes to his own heirs and not to the surviving donee or donees.

6. Gift to mother and child. A legacy to a parent and child in the absence of a contrary intention creates a joint tenancy but slight special circumstances have justified the court in construing the gift as one to the parent for life with remainder to the children (h). But in this country in case of a gift to mother and child a strong presumption arises of construing the gift as a gift to the mother for life with remainder to the child, because a Hindu female is presumed to be given a life estate unless there is definite intention found in the will of giving her a larger interest (i).

- (a) *Mathura v Rukmini* 17 C L J 87.
 (b) *Hemanta v Sudhansu*, 25 C W N 262.
 (c) *Jogeswar v Ram Chund*, 23 I A 37; 23 C 670.
 (d) *Francis v Gabril* 31 B 25, 32.
 (e) *Jalram v Kucerbai* 9 B 491 (gift to nephews), *Nacroji v Perozbai* 23 B 80 (gift to grandsons), *Bhoba Tarini v Peary Lal* 24 C 646 (gifts to wives), *Goelnd v Inayat*, 27 A 310 1904 A. W. N 269 (grant by Government to 4 persons).
 (f) *Damodardas v Dayabhai*, 21 B 1 (gift to sons in equal shares), *Bai Diwali v Patel*, 26 B. 445 (gift to 2 persons living as members of a

- joint Hindu family); *Rewun Pernad v Radha Beeby* 4 M I A 137, (gift to brother and his undivided sons), *Adm Genl v Money*, 15 M 448 (gift to two children of A), *Gopi v Jaldhara*, 33 A 41, 7 A. L. J 941 (gift to daughters); see *Kishori v Mundta* 33 A 665, 8 A L J 757.
 (g) 26 B 445.
 (h) *Newill v Newill*, 7 Ch 253, *Combe v Hughes*, 14 Eq 415.
 (i) *Siva Rau v Villa*, 21 M 425, *Lakshmi Bai v Hirabai*, 11 B 69 on app 573 *Jogeswar v Ram Chund* 23 C 670 P. C., contra *Bai Mamubai v Doria Motarji*, 15 B 443.

Without express and explicit words to the contrary, which the will does not contain, I think I am bound to presume that the testator intended to preserve the ordinary rules of devolution and the general principles of law, save so far as he departed, in terms from them' (a) In fact the presumption is that the donees take as tenants in common (b) Thus where a testator died leaving A, his widow and B, an adopted son, him surviving and directed that A and B should be "heirs of his property" held they took as tenants in common (c) A gift to two named daughters without specifying the shares in which they were to take was held to constitute them tenants in common (d) But the rule of English law seems to have found favour with the court in *Bhoba Tarini v Peary Lall* (e) viz in the absence of any words of severance the legatees would take a joint estate with the right of survivorship

108 (S. 95). Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

When lapsed share goes as undisposed of

Illustration

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them A dies before the testator. His one third of the residue goes as undisposed of

1. The section The section applies to the wills of Hindus, etc It has been stated in S. 105 that a legacy which lapses forms part of the residue of the testator's property Sec 106 says there will be no lapse in case of a joint tenancy for the survivors take the share of the deceased tenant This section lays down the rule that where a share of the legacy that lapses is itself part of the general residue it does not go to the surviving residuary legatees under S 105 but goes as undisposed of, and therefore the heir gets it

2 The rule The rule has been thus stated and explained (f) — 'It seems clear on the authorities, that a part of the residue, of which the disposition fails will not accrue in augmentation of the remaining parts as a residue of the residue, but instead of resuming the nature of residue devolves as undisposed of Residue means all of which no effectual disposal is made by the will other than the residuary clause, but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative In the case of a residue given in moieties, to hold that one moiety lapsing should accrue to the other would be to hold that a moiety of the residue shall eventually carry the whole In this case the testator gave the

(a) *Lakshmi Bai v Hirabai* 11 B 69 77 on app 573, see *Muthumeenakshi v Chendia Sekhara* 27 M 498

(b) *Jogeshwar v Ram Dutt*, 23 C. 670, cited in *Yethirajulu v Mukunthu* 28 M 363, *Damodardas v Dayabhai* 21 B 1; 22 B 833, *Ram Panti v Krishna Panti*, 43 A 600; *Gopi v Jaldhara*, 33 A 41, but see *Gabriel v Inas* 34 M 80

(c) *Lakshmi Bai v Hirabai*, 11 B 69

(d) *Gopi v. Jaldhara*, 33 A 41, *Comant*

v Barefoot, 26 M 433, *Radha Prasad v Rancee Mani* 35 C. 896, see *Adm Genl v Money*, 15 M 448, *Bhoba Tarini v Peary Lal*, 24 C 646

(e) 24 C 646, see also *Gabriel v Inas* 34 M 80 (case of gift Inter vivos)

(f) *Skrumshar v Northcote* 1 Swanst. 566 see *Page v Page*, 2 P. W. 487,

residue of his estate to his two daughters with the right of survivorship but afterwards by a codicil declared that the name of a daughter was struck out with his own hand. No disposition having been made of this part of the residue, *held*, the testator had died intestate in respect of it. So where a testator made no disposition of his property by his will but merely cut off his wife and daughter from any part of the property, *held*, they were entitled to the undisposed of residue of the testator's personal estate according to English law (a). Where a testator gave his share of the residue to his sister, an attesting witness to the will, *held*, the legacy having failed it should be dealt with under this section as if it were not disposed of by the testator and therefore should go to the heir as on an intestacy (b). This shows that lapse arises not only on death of a legatee but from failure of the legacy for any cause whatsoever. So if a bequest to one of several residuary legatees is revoked by a codicil the revoked bequest goes to the heir (c), unless there is an intention to the contrary (d). The heir is not excluded from the undisposed of residue without language of disinheritance (e).

3 The rule is subject to testator's intention in English law. The tendency of modern decisions in England is to make the rule embodied in this section not an absolute of rule of law but one subject to the intention of the testator. Thus, in *re Parker* (f), where a testator gave a share of the residue in trust for A and B and the remaining part of the residue in trust for A, B, C and D with a gift over of the share in default of such persons, the court observed, "the gift over shows that the testator was dealing with the share as a whole which is inconsistent with any partial failure of the trust thereof," or, in other words, the gift over carried the lapsed share of the residue and it did not go as undisposed of. The court doubted whether *Skrymsher v. Northcote* (g) could stand after the decision in *re Palmer* (h). Further, this case expressly overruled the decision in *Humble v. Shore* (i) which laid down that even an express direction of the testator that a lapsed share of the residue should fall into the residue was to be ignored and such share treated as undisposed of by the testator. The case of *re Palmer* (j) is, therefore, authority for the proposition that if there be a direction of the testator that a share of the residue shall fall into the residue then it shall not pass as undisposed of. Similarly, where a gift of a share of the residue is revoked, ordinarily the share will pass as undisposed of, but the testator may prevent such a contingency by suitable directions or expression of intention (k).

But in *Johnson v. Johnson* (l) it was laid down that the undisposed of residue or share of residue would be divided among all the next of kin even where the testator had excluded one of such next of kin from any share in it. In the older cases like

- (a) *Johnson v. Johnson*, 4 Beav. 318.
Jull v. Jacobs, 3 Ch. D. 703; see
Gooleydas v. Premji, 13 B. 61.
 (b) *Adm. Genl. v. Lazar*, 4 M. 244.
 (c) *Sykes v. Sykes*, 3 Ch. 301; *Re*
Powell, (1918) 1 Ch. 407; *Re*
Whitford (1926) Ch. 118, 1 1019.
 (d) *Re Whiting*, (1913) 2 Ch. 1; *Re*
Wilkins, (1920) 2 Ch. 63.
 (e) *Tooleydas v. Premji*, 13 B. 61.

- Erasha, v. Jербat*, 4 B. 337.
 (f) (1901) 1 Ch. 408.
 (g) 1 Swanst. 566.
 (h) (1893) 3 Ch. 369 (see below).
 (i) 7 Harc. 247.
 (j) (1893) 3 Ch. 369.
 (k) *Re Wilkins*, (1920) 2 Ch. 63 (see
 cases cited).
 (l) 4 Beav. 318.

Skrymsner v Northcote (a) or *Humble v Shore* (b), the intention of the testator was not allowed to modify the operation of the rule and that view is embodied in this section (c)

4. Gift out of the residue. "If a part of a particular fund be given to one person and the residue to another it is a question of intention not subject to any particular rule, whether the gift of the residue is to be read as a gift of the mere balance of the fund after deducting the amount of the fund previously given out of it, as in the cases of *Page v Leapingwell* (d), *Easuri v Appleford* (e), or a gift of the entire fund subject to the gift previously made out of it as in *Falkner v Butler* (f), *Carter v Taggart* (g), *re Harris' Trust* (h). In the latter case, if the gift of part fails the gift of the residue may carry the whole fund, in the former case no (i). A legacy given to a legatee in lieu of a share of the residue originally given to him is payable out of the whole residuary estate and not simply out of the share originally given to that legatee (j) unless there is an express direction to that effect (k). There is difference between a legacy and a legacy given out of a share of the residue which is a mere subdivision of it, when the latter legacy fails it goes to the heir as undisposed of (l).

109 (S. 96). Where a bequest has been made to any

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime

child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Illustration

A makes his will by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son C, who survives A and having made his will whereby he bequeaths all his property to his widow, D. The money goes to D.

1. The section. The section applies to the wills of Hindus etc. This section like Ss 106 and 108 lays down an exception to the application of the doctrine of lapse (S 105). The object of the section is to prevent the family of a child from being deprived of a legacy in consequence of law which the common feelings of mankind declared to be a disappointment of the intention of the father (m).

2. Effect of the section. The section corresponds to S 33 of the Wills Act (1 Vict c 26) the expression lineal descendant being substituted for the word issue. The effect of that section it has been said, is 'to prolong the

- (a) *Swain* 566
- (b) 7 *Hare* 247
- (c) See the Bombay cases cited above
- (d) 18 *Ves.* 463
- (e) 5 *My & Cr.* 56
- (f) *Amb* 514
- (g) 16 *Sim* 423

- (h) *J. hns* 199
- (i) *Re White*, 1926 Ch 118 121.
- (j) *Sykes v Sykes*, 3 Ch 301.
- (k) *Re Wood's Will* 29 *Beav* 236
- (l) 1010 12 *Ed.*
- (m) 11 *a v. Lloyd* 4 *Beav* 231
- (n) 1 *a v. H. Inter*, 5 *Hare* 306 313

life of the deceased child by a fiction for a particular purpose, namely, that the legacy might not lapse, but certainly not for any other purpose" (a) The deceased legatee is in the contemplation of law in existence and therefore the legacy vests in him and not in the issue surviving him (b) The property of the father (the testator) is therefore disposable by the will of the predeceased son, but if the son leaves the subject matter of the legacy to the father (the testator) by will the gift fails, because the son is deemed to have survived the father (c) The lineal descendant of the predeceased child is not substituted in place of the latter but the legacy vests in the latter, or, rather becomes an accretion to his estate and is disposable by him (d) If not disposed of, it descends to his lineal descendants as on an intestacy so that they are entitled to it Probate duty is payable by the executor of the legatee as if he had survived the testator (e) But it is necessary to the application of the rule that the predeceased child of the testator must leave lineal descendants or issue

3 Application of the rule. The section applies where the child is an adopted child (f), or is a posthumous child of a predeceased son of the testator (g), or is dead at the date of the will (h), or where the issue of the legatee surviving the testator is not the issue who survives the legatee (i), or where a predeceased child is appointed as executor under his father's will but is prevented from acting on account of his death (j) The rule applies also to an appointment by will under a general power (k) To prevent lapse, it is sufficient that any issue e g a grandchild of the legatee should be in existence at the death of the testator Such a legacy is a vested interest in the legatee and passes to his representatives or under his will, as the case may be and not to the issue, whose existence prevents the lapse (l)

4 Exclusion from the operation of the rule The rule applies when in default of its application there would be lapse and not otherwise Therefore the rule does not apply where the gift is to children as joint tenants (S 106), or where the gift is to a class (S 111), even though the class be reduced to one, 'these gifts are still read as gifts to those who survive, not as gifts to the possible members of the class who die in the testator's lifetime, and that the gift, in regard to those children who so die, is not to be treated as a gift to individuals (m). The construction of a gift to a class is not altered by the fact that the testator has directed the issue of any deceased child to take the share of that child (n) Where however the gift is to children as designated persons

(a) *Pearce v Graham*, 32 L J Ch 359. *Eager v Fumtoll*, 17 Ch D 115.

(b) *Jitu Lal v Bnda Bibee*, 16 C. 549

(c) *Johnson v Johnson* 3 Hare 157. *Re Mason's Will*, 34 Beav 494. *Re Hensler*, 19 Ch D 612

(d) *Pickett v Rodger*, 5 Ch D 163, 172.

(e) *Re Hone's Trust*, 22 Ch. D 663

(f) See Sched III

(g) *Re Griffith's Settlement*, (1911) 1

Ch 246 distgd in *Re Greenwood*, (1912) 1 Ch 392

(h) *Widson v Widson* 2 Sm & G 396 404

(i) *Re Parker*, 1 Sw & Tr 523

(j) *Ramaswamy v Kuppusami*, 13 M L J 351

(k) *Eccles v Cheyne*, 2 K & J 676.

(l) *Re Parker*, 1 Sw & Tr 523

(m) *Harvey v Gillow*, (1893) 1 Ch. 567, 571

(n) *Olney v Bates*, 3 Dr 319

and not as a class the section applies (a) This section is only applicable and has statutory effect in the case of gifts to issue and has no application to the case of gifts to collaterals (b) The section does not apply to the case of an appointment under a limited power (c) The provision in this section it has been said is an exceptional one and the court is justified in refusing to extend it to a case not governed by the Succession Act or the Hindu Wills Act (d)

5 Contrary Intention The rule applies only in the absence of an intention to the contrary in the will A testator may therefore by express provs on direct that the share of a child in the event of the child dying before him shall go over to somebody else (e)

110 (S. 97). Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death in the testator's lifetime, of the person to whom the bequest is made.

Bequest to A for benefit of B does not lapse by A's death

The section The section applies to the wills of Hindus *etc* It sets out another exception to lapse It states that a charge or trust created in favour of a person will not lapse and fall into the residue by reason of the death of the trustee A trust shall not fail for want of a trustee The section contemplates a legacy to one person being made for the benefit of another who thus acquires the beneficial interest in the same Although the section speaks of death only of the trustee the rule applies also where a trustee disclaims the trust or becomes incapable of taking the estate or the trust otherwise fails (f) As has been said the trust follows the legal estate wherever it goes except it comes into the hands of a purchaser for valuable consideration without notice the legal estate (in the hands of the trustee) is nothing but 'he shadow which always follows the trust estate (g) Where a legacy is given to A in trust for B the beneficial interest of B will not lapse by reason of the death of A in the lifetime of the testator Thus where a testatrix by will appointed £4000 to A but in consideration thereof he was to pay to B an annuity of £100 per annum and she devised the residue to C and A died in the lifetime of the testatrix *held* the annuity in favour of B did not lapse but the legacy to A fell in the residue devised to C (h) But a revocation of a legacy will destroy the charge (i) Where there was a gift of freehold estate to a creditor on condition that his executors and administrators should relinquish all claim to sum due to him by the testator and the creditor died before the testator without issue *held* the intention of the testator was to create a trust and therefore the person who got the estate was bound by the charge created on

- (a) *Re Stansfeld* 15 Ch D 84
 (b) *Willoughby v Drummond* (1911) 1 Ch 358 *Ramamatham v Ranganatham* 24 M 299 *Slama Chum v Ahellramont* 27 C 521 527
 (c) *Re Griffith's Settlement* (1911) 1 Ch 246
) *Ramamatham v Ranganathan* 24 M 299 *see Jitu Lal v Bindu Bhai* 16 C 549

- (e) *Re Moore's Trust* 10 Hare 171
Fullford v Fullford 16 Bear 565
Jitu Lal v Bindu Bhai 16 C 549
 (f) *Lewis on Trusts* 13 Ed 869
 (g) *All Genl v Lady Downing* Wilm 1 21 22
 (h) *Eccles v England* 2 Vern 466 469
 (i) *Cowper v Mantell* 22 Bear 223

it and the personal estate of the testator was exonerated from the payment of the debt Jessel M R observed that there was no sound distinction 'between a condition to pay a sum of money to a legatee, or an annuity to a legatee, or a condition to give a valuable thing to a legatee, and a condition that his personal estate shall be exonerated from a debt' (a) Again where by a will property is given to a legatee but charged with payment, either in lump or by way of annuity in favour of another person, then on the legatee's death before the testator the charge is not affected (b)

111 (S 98) Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Survivorship in case of bequest to described class

Exception —If property is bequeathed to a class of persons described as, standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations

(i) A bequeaths 1 000 rupees to the children of B' without saying when it is to be distributed among them B had died previous to the date of the will, leaving three children C D and E E died after the date of the will, but before the death of A C and D survive A The legacy will belong to C and D, to the exclusion of the representatives of E

(ii) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B At the death of the testator, B had two children living C and D, and he never had any other child Afterwards, during the lifetime of A, C died leaving E, his executor D has survived A D and E are jointly entitled to so much of the leasehold term as remains unexpired

(iii) A sum of money was bequeathed to A for her life and after her decease, to the children of B At the death of the testator, B had two children living, C and D, and, after that event, two children, E and F, were born to B C and E died in the lifetime of A, C having made a will, E having made no will A has died leaving D and F surviving her The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E and one to F

(iv) A bequeaths one third of his lands to B for his life, and after his decease to the sisters of B At the death of the testator, B had two sisters living, C and D, and after that event another sister E was born C died during

(a) *Re Kirk* 21 Ch. D 431
(b) *Higg v Wigg*, 1 Atk. 382, see

Tregonwell v Sydenham 3 Dow 194.

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- Jitu Lal v Bindu Bibee* 16 C 549
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- (h) *Geeles v England* 2 Vern 466 463
- (i) *Cosper v Mantell* 22 Beav 223

It and the personal estate of the testator was exonerated from the payment of the debt Jessel M R observed that there was no sound distinction 'between a condition to pay a sum of money to a legatee or an annuity to a legatee, or a condition to give a valuable thing to a legatee and a condition that his personal estate shall be exonerated from a debt (a) Again where by a will property is given to a legatee but charged with payment either in lump or by way of annuity in favour of another person, then on the legatee's death before the testator the charge is not affected (b)

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Illustrations

(i) A bequeaths 1000 rupees to the children of B without saying when it is to be distributed among them B had died previous to the date of the will leaving three children C D and E E died after the date of the will but before the death of A C and D survive A The legacy will belong to C and D to the exclusion of the representatives of E

(ii) A lease for years of a house was bequeathed to A for his life and after his decease to the children of B At the death of the testator B had two children living C and D and he never had any other child Afterwards during the lifetime of A C died leaving E his executor D has survived A D and E are jointly entitled to so much of the leasehold term as remains unexpired

(iii) A sum of money was bequeathed to A for her life and after her decease to the children of B At the death of the testator B had two children living C and D and after that event two children E and F were born to B C and E died in the lifetime of A C having made a will E having made no will A has died leaving D and F surviving her The legacy is to be divided into four equal parts one of which is to be paid to the executor of C one to D one to the administrator of E and one to F

(iv) A bequeaths one third of his lands to B for his life and after his decease to the sisters of B At the death of the testator B had two sisters living C and D and after that event another sister E was born C died during

(a) *Re Aik* 21 Ch. D 431

(b) *Higg v Higg* 1 Aik. 382, see

Tregonwell v Sydenham 3 Dow 194

the life of B, D and E have survived B One third of A's lands belong to D, E and the representatives of C, in equal shares

(v) A bequeaths 1,000 rupees to B for life and after his death equally among the children of C Up to the death of B, C had not had any child The bequest after the death of B is void

(vi) A bequeaths 1000 rupees to "all the children born or to be born" of B to be divided among them at the death of C. At the death of the testator, B has two children living, D and E After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B After the death of C, another child is born to B The legacy belongs to D, E, F and G, to the exclusion of the after-born child of B

(vii) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority At the testator's death, B had one child living, named C He afterwards had two other children, named D and E E died but C and D were living when C attained majority The fund belongs to C, D and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority

1. **Change.** The words 'are have been substituted for the word 'shall be' in the section and in the explanation

2 **The section.** The section applies to the wills of Hindus, *etc* Gifts are of three kinds those which convey a present title and interest and a present right of enjoyment, those which convey a future interest, these being subdivided into two kinds, namely, those which are vested, that is, present in interest, but of which the enjoyment is deferred, and those which are contingent, that is to say, in which neither title nor right of enjoyment is given at present but both depend upon future uncertain events, see (Ss 119, 120, 124) (a) This section with its exception applies to vested interests only, *i. e.* with gifts of the first two classes and not to the third (b) The section deals amongst other things with the construction and operation of a gift to a class, some members of which come into existence between death of the testator and the time when the gift takes effect, or as it is called, the period of distribution (c) The intention of the framers of the Act, it has been pointed out, was to assimilate the law here to that which exists in England, although the section with its exception and illustration (iii) is not happily expressed (d)

3 **The rule.** The section states that when a legacy is given to a class of persons, the class is to be ascertained at the time of distribution Two points therefore arise for determination, (1) what is the period of distribution and (2) whether it is a gift to a class or to specified individuals 'The rule may be divided into three heads First if there is an immediate gift the rule lays down that only those children in existence at the time of testator's death shall take, although his intention was obviously different By way of exception

(a) *Ram Lall v Kanai Lal*, 12 C 663, 669

1 *Maseyk v Ferguson*, 4 C 670

(c) See *Illustrations* iii, iv, vi

(d) *Maseyk v Ferguson*, 4 C 670

to this first head, if there are no children of A in existence at the testator's death then the rule of convenience ceases to operate, and all subsequently born in accordance with the testator's intention take (a) The second head of the rule may be stated as follows. If the gift is in future as for instance to A for life with remainder to B's children, the rule provides that only those children of B shall take who come into existence before A's death. Here again there is an exception that if there be no children of B *in esse* before A's death, then the rule ceases to operate, and subsequently born children take (b) The third head may be stated as follows. Where there is a gift to A for life and after his death to B's children who attain twenty one then if at A's death there are children of B who have attained twenty one or representatives of such children, the rule applies and the class closes. If at A's death there are only infant children of B who subsequently attain twenty-one then again the class closes, when the first child attains that age (see *illustr.* (c)), and in all cases the rule is excluded if there is an express intention of the testator to the contrary (c)

The rule is treated as a rule of convenience by which a person having a vested interest at a particular date is entitled to be paid and those who come into existence afterwards are excluded in order to permit a distribution at the vested date of payment. But it would be more correct to say that the rule represents 'the solution arrived at as the result of an endeavour by the court to reconcile two apparently inconsistent directions—the one that the whole class of children shall take and the other that the fund shall be divided at a moment when the whole class cannot be ascertained' (d). 'The principle of the rule is that the class to take is to be ascertained as soon as possible in order that the beneficiaries may know what their shares are and that the fund may be distributed' (e). In a case where the section applies the testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is that if all cannot take those who can shall do so (f). In such cases therefore there is no lapse but the survivors take the whole (g). Nevertheless it cannot be disputed that the rule when applied more or less defeats the intention of the testator (h). In order to apply the section one must find a period of distribution fixed or pointed to by the testator and a class to take at that period whose strength may be augmented by future births

- (a) But the bequest will be void in this country
 (b) Not applicable in this country, see *illustr.* (c)
 (c) *Re Chartres* (1927) 1 Ch 466, 471
 (d) *Re Stephens*, (1904) 1 Ch 322 328 cited in *Re Chartres*, (1927) 1 Ch (474)
 (e) *Re Chartres*, (1927) 1 Ch (471)
 (f) *Re Coleman v Jarrom*, 4 Ch D 165 cited in *Mangaldas v Tribhuvan das*, 15 B 652, see *Dakshayani v Amrita*, 23 C. W. N 826

- (g) *Re Harvey*, (1893) 1 Ch 567, *Re Coleman and Jarrom*, 4 Ch D 165, *Re Spiller* 18 Ch D 614, *Lee v Pain* 4 Hare 201 250, *Fell v Biddolph* L. R. 10 C. P. 701, *Dmond v Boslock*, 10 Ch 358, *Kingbury v Waller* 10 A. C. 187 (lapse by death and attestation) similarly in case of revocation by codicil of the share of a member of the class *Re Dunster*, (1909) 1 Ch 103
 (h) *Re Chartres*, (1927) 1 Ch (475)

4. The effect of a gift to a class. The effect of a gift to a class has been fully discussed in *Ram Lal v. Kanai Lal* (a) where it has been pointed out that if the class which is the object of the gift is to be ascertained on the death of the testator, no question of remoteness can arise and the section lays down that the gift takes effect in favour of such members of the class as are then capable of taking (b). If the ascertainment of the class is deferred to a later date, the Exception says, that those who become members of the class within the extended period are admitted; and, subject to any question of remoteness those who are thus capable of taking, take. In either case, if any members of the class are incapable of taking because born after the date of ascertainment, they are simply excluded, and the rest take the whole; and this is so even if the gift be to persons born and to be born (c). In case of an immediate gift, if any member of the class die in the testator's lifetime he is simply excluded, and the rest take the whole (d) or if the gift to one is revoked by codicil (e), or if one is incapacitated from taking because he has attested the will, he is simply excluded and the rest take the whole (f). Because some members of the class are excluded from taking (not being in existence at the testator's death) the gift to the whole class does not fail (g).

It follows that the death of a member of a class before the testator, where it is the class which is the immediate object of the gift, has the effect of excluding him from all share in the legacy (h), whether such member leaves issue or not is immaterial (i). In such a case therefore the rule laid down in S 109 has no application. In case of a postponed gift, however, a member of the class does not lose his interest by his death before the testator (j), for the representatives of those who die before the period of distribution become entitled to the share of the deceased member (k), unless the fact of survivorship of the testator was made a condition to the getting of the legacy (l). In such a case the gift vests in all the members of the class in existence at the death of the testator, but so as to open and let in children subsequently coming into existence before the period of distribution (m).

- (a) 12 C 663, fold in *Khimji v. Morari* 22 B 533, *Dakshyani v. Amrita* 23 C W N 826
 (b) *Cally Nath v. Chunder Nath*, 28 C 378
 (c) *Ayton v. Ayton*, 1 Cox 327; *Whitbread v. Lord St John* 10 Ves 152; see also *Maseyk v. Fergusson*, 4 C. 670; *Ado Gent v. Karmali*, 29 B 133, 6 Bom L R 611; *Mann v. Thompson*, Kay 638
 (d) *Doe v. Sheffield*, 13 East 525, *Re Coleman v. Jaimon*, 4 Ch D 167; *Fitzroy v. Richmond*, 28 L J, Ch, 750
 (e) *Shaw v. Mc Mohan* 4 Dr & W. 431; *Re Jackson* 25 Ch D 162; *Re Dunster*, (1909) 1 Ch 103 (exclusion from participation)
 (f) *Young v. Davies*, 2 Dr & S 167, *Fell v. Biddolph*, L R 10 C. P.

- 701
 (g) *Rat Bishen Chand v. Asmalda Koer* 11 I A 164 6 A 560 fold in *Ram Lal v. Kanai Lal*, 12 C. 663
 (h) *Fitzroy v. Richmond*, 28 L J Ch 750
 (i) *Re Harvey's Estate*, (1893) 1 Ch 567
 (j) *Cooke v. Bowen*, 4 Y. & C (Ex) 244, *Watson v. Watson* 11 Sim 73, *Pattison v. Pattison*, 19 Beav 638
 (k) *Re Roberts*, (1903) 2 Ch. 200
 (l) *Parr v. Parr*, 1 My & K. 647; *Re Miles*, 61 L T. 359, 11 28 p 716 7
 (m) *Hawkins* 3 Ed 91 citing *Declaine v. Afello*, 1 Bro C. C. 537; *Re Dawes Trusts* 4 Ch D 210; *Oppenheim v. Henry*, 10 Har 441; *Watson v. Young*, 28 Ch. D. 436.

5 Distribution of accruing shares The accruing shares are divided equally among the survivors on the failure of the gift to a member of the class in the absence of any declared intention, even though the testator had disposed of the subject of the gift among the original objects in unequal shares (a).

6. Period of distribution (b). In as much as the Exception allows a gift to take effect where a legatee comes into existence between the death of the testator and the time when the gift takes effect, it is necessary to have a clear notion of what is meant by the expression 'period of distribution.' It means the period when the gift becomes payable or distributable or takes effect in enjoyment. In case of an immediate gift the period of distribution is the date of the instrument taking effect; therefore, in case of a deed it is the date when the deed takes effect, in case of a will, the date of the testator's death. In case of a deferred gift the period of distribution is postponed, *e.g.*, where there is a gift to A for life and then to the sons of B, the period of distribution is the death of A (c), although it is not necessarily so in every case where a life estate intervenes (d). The payment of an annuity does not affect the period of distribution (e). The period of distribution again may be the date of happening of some event on which the gift is conditional, *e.g.*, where the limitation over to a class after a life interest is to take effect not on the death but on the bankruptcy of the life tenant (f), or on his or her remarriage (g). Where a testator gave the residue of his estate to trustees upon trust to divide the same among his nephews and nieces to be paid to the nephews attaining the age of 21 and to the nieces marrying or attaining that age, it was held "that the period of distribution in this suit is the date when any nephew or niece shall attain majority within the provisions of the Succession Act or when any niece should marry, whichever event should first happen" (h). Such cases are referred to in the section by the words "or otherwise." A direction that legatees are to be paid on a particular member attaining a particular age does not make the interest of the class contingent upon their attaining that age (i).

7. Ascertainment of the class in case of a gift to children as a class

(j) (1) Where a bequest to a class, *e.g.*, to children as a class, is immediate, those

(a) *Maseyk v. Fergusson*, 4 C. 670, 673

(b) See S 124 note 6

(c) *Berkeley v. Swinburne*, 16 Sim 275, cf *Re Stephens*, (1904) 1 Ch. 322; *Barnaby v. Tassell*, 11 Eq 363

(d) *Re Roberts*, 19 Ch D 520, 527, *Knapp v. Vassall*, (1895) 1 Ch 91, 96 *Soorjeemoney's Case* 9 M. I. A 123, explained in the *Tagore Case*, 9 B L R 377 has established that there is no objection under Hindu law to a gift which is to take effect after a prior life estate provided it be to a person capable of taking. *Bhupendra v. Amarendra*, 43 I. A. 12, 43 C. 432, 438

(e) *Re Whiteford*, (1903) 1 Ch 889;

Colly Nath v. Chunder Nath, 8 C 378

(f) *Re Aylwin's Trusts*, 16 Eq 585

(g) *Bainbridge v. Cream*, 16 Beav 25; *Re Dear*, 61 L. T 432 H. 28 p. 717-18

(h) *Maseyk v. Fergusson*, 4 C. 670; see *Re Emmett's Estate* 13 Ch D 484, *Re Deloitte* (1919) 1 Ch 209, *Andrews v. Partington*, 3 Bro C C 401, but see *Re Paul's Settlement Trusts*, (1920) 1 Ch. 99, 107

(i) *Re Ludwig* (1916) 2 Ch 26

(j) W 852 11 Ed "The rule extends to gifts to grandchildren, issue brothers, nephews, cousins" *Hawkins* 86, 3 Ed.

in existence at the death of the testator and those alone are entitled to take (a). The rule applies to gifts of income of property (b) and also to powers of appointment (c). But some members of the class must be in existence when the gift takes effect. The operation of the rule may be excluded by express words (d).

(2) The testator may indicate the gift to be confined to those children who answered to the description at the date of the instrument, then only those children will be entitled (e); but the court leans in favour of the inclusion of those born during the lifetime of the testator (f). As has been observed, "whenever there are words used in a will indicative of a class the words must be taken to denote the class as it is constituted either at the date of the will or at the death of the testator" (g).

(3) Where however the gift is postponed, children born after the testator's death and before the period of distribution may be entitled (h) *eg*, where there is a gift to the children of A when such children attain the age of 21 (i). It is immaterial whether the gift is vested or contingent (j). The rule against perpetuity must not be infringed (k) in which case intestacy results but the fund will be divided among those of the children living at the testator's death as have attained the requisite age (l).

(4) No members born after the period of distribution may claim (m), even where the legacy is given to children "born or to be born" (n).

(5) Where there is a gift of the corpus of property and there are conditions attached to the gift, so that the gift becomes payable or vests in children at different times, then those children are excluded who are born after the fund becomes distributable in respect of any one object or member of the class, or after the vesting in possession of any of the shares (o). The rule was held not applicable to bequests of income (p) but this view has not been accepted in later cases (q). One curious result of the rule is that a gift to the children of A (a living person), on their attaining the age of 25 will be good, if at the time

(a) *Davidson v. Dallas*, 14 Ves 376; *Coventry v. Coventry*, 2 Dr. & Sm 470.

(b) *Re Powell*, (1893) 1 Ch. 227.

(c) *Paul v. Compton* 8 Ves 375.

(d) *Scott v. Lord Scarborough*, 1 Beav. 154.

(e) *Sheret v. Bishop*, 4 Bro. C. C. 55.

(f) *Freemantle v. Taylor*, 15 Ves 363, see *Re Deighton's Settled Estates*, 2 Ch D 783.

(g) *Parker v. Tootal*, 11 H. L. C 143, 164. The same rule applies to gifts of income, *Re Powell*, (1893) 1 Ch 227.

(h) *Ospenhlem v. Henry*, 10 Hare, 441.

(i) *Ringrose v. Bramham*, 2 Cox 385, 2 R. R. 84; *Hughes v. Hughes*, 14 Ves. 256; *Clarke v. Clarke*, 8 Sim 59.

Re Mercin, (1871) 3 Ch. 197.

Benlitch v. Duke of Portland, 7

Ch 693, see *Soudamney v. Jogesh*, 2 C. 262, but see *Ram Lal v. Kanai Lal*, 12 C. 663.

(l) *Re Coppard* 35 Ch D 350; *Re Mercin* (1891) 3 Ch 197, 204; but see *Pearks v. Moseley*, 5 A. C. 714, 719.

(m) *Andrews v. Partington*, 3 Bro. C. C. 401, *Berkeley v. Swinburne* 16 Sim 275, *Re Gardiner's Estate*, 20 Eq. 647; *Re Deloitte*, (1919) 1 Ch 209; *Re Paul*, (1920) 1 Ch 99.

(n) *Gilbert v. Boorman*, 11 Ves 238; see *Clarke v. Clarke* 8 Sim. 59.

(o) *Gillman v. Daunt*, 3 K. & J. 44; *Malins v. Thompson*, 18 Jur. 826; *McCann v. Thompson*, 18 Jur. 826; *Re Deloitte*, (1919) 1 Ch 209.

(p) *Re Wenmoth*, 37 Ch. D. 265.

(q) *Re Powell*, (1893) 1 Ch 227; *Re Stephens*, (1914) 1 Ch 322, 329.

of the instrument coming into operation a child of A has attained that age (a), but it will be bad if A has no children at the time aged 25 (b) Therefore the class is fixed and the fund becomes distributable as soon as one member of the class has attained the requisite age or performed the condition, if none has, the gift remains open until the condition is performed (c)

(6) Where, however, the testator manifests an intention that the gift should be available to all members of a particular class, *eg.*, to all the children a man may ever have but fixes a period when their shares become payable, all the members of the class will be entitled (d)

(7) Upon an ordinary limitation by way of remainder to children, *etc.*, as a class *eg.* to A for life and after his death to the children of B, all who are *in esse* at the time of the death of the testator take vested, and, consequently transmissible interests immediately upon the testator's death, and all who come *in esse* before the particular estates end and the limitation takes effect in possession are to be let in, and take a vested interest as soon as they come *in esse*, and they and their representatives will take as if they had been *in esse* at the testator's death (e)

8 Application of the above rules. The above rules for determining the period of time for ascertaining the members of a class apply only in the absence of any express indication by the testator (f) Further, the gift should be to a class and not of a specific amount to each member of the class, *i.e.*, not to members as designated persons In the latter case only those members of the class are entitled who belong to the class when the instrument takes effect (g) Where a gift was made by a testator 'to my grandchildren by my said late daughter E W and also to my grandson F W M and to his step brother G W M', *held* this was a gift to them as *personae designatae* and they took vested interests in their shares from the testator's death (h) A gift therefore, will not be to a class if the testator intends a certain number of persons to take as individuals (i) Exclusion by name of some individuals will not prevent a gift being to a class (j) A number of individuals may take as a class even though the gift be to them by name (k) Where there is an enumeration by the testator of persons to be benefited, and that enumeration is erroneous, if the court arrive at the conclusion that a particular

(a) *Picken v Mathews*, 10 Ch D 264

(b) *Re Mercin* (1891) 3 Ch 197, Underhill and Strahan p 82.

(c) *Watson v Young* 18 Ch D 436 Underhill and Strahan p 82, *Re Emmet's Estate* 13 Ch D 484 490; *Re Bedson's Trusts*, 28 Ch D 523, 526, *Knapp v Vassall*, (1895) 1 Ch 91, 96, *Andrews v Partington*, 3 Bro C. C. 401

(d) *Deffis v Goldschmidt*, 19 Ves 566, *Eddowes v Eddowes* 30 Beav 603

(e) *Ellison v Alvey* 1 Ves sen 111, *Pestonji v Akashedbal* 7 Bom L R 207 *Baldwin Rogers* 3 D & M & G 649, The rule applies only where there is an object in

existence when the prior gift ceases to exist These various rules have been summarised mainly from the well known works of Mr Jarman & Sir J Williams

(f) *Barker v Lea* 3 V & B 115, *Re Deighton's Settled Estates*, 2 Ch D 783

(g) *Rogers v Mutch* 10 Ch D 25, *Butler v Love* 10 Sim 317

(h) *Adm Genl v Money* 15 M 448 469

(i) *Orford Orford*, (1903), 11 R 121, *Re Whitton* (1924) 1 Ch 122

(j) *Diamond v Baslock* 10 Ch 358, *Miles Wilson*, (1903) 1 Ch 139

(k) *Re Stansfield* 15 Ch D 84, *Re Jackson* 25 Ch D 162

13. Application of the rule to Hindus.—*Old law* The *Tagore* case (a) recognised and laid down what was believed to be the rule under Hindu law that a gift by will to a person unborn at the time of the testator's death was void. When the Hindu Wills Act (XXI of 1870) was passed and came into operation the law had been settled in this way. Then the question arose whether the rule was changed by the Hindu Wills Act, S 2 of which among other sections of the Indian Succession Act of 1865 extended to the wills of Hindus made on or after the first of September 1870 this and the following three sections of the Succession Act. But it was held that the Legislature did not intend to alter the law and that "the operation of the applied sections was controlled," for the extension to the Hindus of a large number of sections and parts of the Succession Act of 1865, an Act in its origin passed for persons other than Hindus, would be attended with some most unexpected and undesired results (b) Accordingly the law as regards the capacity of a legatee to take remained the same as it stood before the passing of Hindu Wills Act. Any legatee, born after the death of the testator where the parties were governed by Hindu law, was debarred from claiming the legacy (c)

In such cases it has now been held and since followed in other cases that those born after the testator's death are simply excluded and the other members of the class take the whole legacy, unless the testator intended that the gift should go to the whole class or none at all (d) The rule in *Leake v Robinson* (e) is not applicable to Hindus. Therefore when a gift to some members of the class fails the whole gift will not fail (f) In *Khimji v Morari* (g) it was held on construction of the will that the testator had no secondary intention of benefiting any particular member of the class to which the gift was made and therefore on the primary intention of benefiting the whole class failing, because some members of the class were born after the testator's death, the gift to the whole class failed (h).

New law The law as laid down above has been materially changed by the Hindu Disposition of Property Act (XV of 1916) which was passed with the avowed object of removing certain existing disabilities in respect of the power of disposition of property by Hindus. The rule laid down in the *Tagore* case (i) requiring the donee to be a person in existence has been abrogated in some instances

- (a) 4 B. L. R. (O. C.) 103, on app. 9 B. L. 377, 1 A. Sup. Vol. 47.
 (b) *Alangamonjori v Sanamoni* 8 C. 637, *Calli Nath v Chunder Nath*, 8 C. 378, *Ram Lal v Kanai Lal*, 12 C. 663.
 (c) *Jaceral v Kabbal*, 15 B. 326, on app. 16 B. 492, *Tribhuvandas v Gangadas* 18 B. 7, *Ado Gent v Karmali* 29 B. 133, 6 Bom. L. R. 601, *Kristoromoni v Narendra* 16 C. 343 (P. C.), see *Amanjama v Padmanabhayya*, 12 M. 393.
 (d) *Rat Bishen Chand v Amalja Koor*, 11 I. A. 164, 6 A. 551, 572 (gift in et vivis), *Ram Lal v Kanai Lal* 12 C. 663, *Gorthandas v Bai Ram Coocer*, 26 B. 449, 3 Bom. L. R.

857. For further discussion of this topic see S. 115 note.
 (e) 2 Mer. 363.
 (f) *Ram Lal v Kanai Lal* 12 C. 663, *Bhoba-arini v Pearu Lal* 24 C. 646, *Ranganadha v Bhaghirathi* 29 M. 412, *Ado Gent v Karmali*, 29 B. 133, *Bhagabati v Kali Charan* 32 C. 972 add on app. 33 C. 465, *Radha Prasad v Ranimoni*, 38 C. 188 (see cases discussed) on app. 20 C. L. J. 348 P. C.
 (g) 22 B. 533, *Krishnanath v Almaram* 15 B. 543.
 (h) See *Chundi Charan v Sulherwar*, 15 I. A. 149, 16 C. 71.
 (i) 9 B. L. R. 377.

14 Exception. The Exception states that where possession of a gift to a class is postponed by a prior gift of a limited interest, the class is not determined on the death of the testator but is augmented by all those who may come into existence between the testator's death and the termination of the prior interest, and in case of death of any member of the class his representatives will be entitled to succeed. In other words, the period of distribution is postponed till the termination of the prior interest (a). In such cases 'the children, if any, living at the death of the testator take an immediately vested interest in their shares subject to the diminution of those shares (i.e., to their being divested *pro tanto*), as the number of objects is augmented by future births, during the life of the tenant for life (the holder of the prior estate), and, consequently, on death of any children during the life of the tenant for life, their shares (if their interest therein is transmissible) devolve to their representatives (b). The property will go to the representatives of a deceased member of the class where the property is vested in that member (c), but not where the interest is not vested in that member (d).

CHAPTER VII.

OF VOID BEQUESTS

112 (S 99) Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

Illustrations

(i) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator B has no son. The bequest is void.

- (a) *Holland v Wood*, 11 Eq 91
 (b) *All Genl v Crispin*, 1 Bro C 386, *Middleton v Massenger*, 5 Ves 136, *Watson v Watson*, 11 Sim 73, *Pattison v Pattison*, 19 Beav 638 J 1642 7 Ed. The rule applies not only in case of remainders but also in case of

- executory gifts *Baldwin v Rogers*, 3 D M & G 649, *Re Aylwin's Trusts*, 16 Eq 585, 590 J 1644
 (c) *Radha Prasad v Raninani*, 15 C. W N 113
 (d) *Srinivasa v. Dandayudapani* 12 M. 411

(ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

(iii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C has no son. Afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(iv) A bequeaths his estate of Green Acre to B for life and at his decease, to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(v) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000 rupees.

The section. The section applies to the wills of Hindus, *etc.* The section is distinguished from S. 105 by the fact that the latter deals with the case of a legatee actually in existence at the date of will who, however, dies before the testator when, according to that section, the legacy will lapse. This section, on the other hand, contemplates a case where the legatee is not in existence and does not come into existence before the testator's death. Hence such a legatee can be referred to only by description and not by name. This section differs from S. 111 by the fact that this section deals with a bequest made to a person, the other with a bequest made "to a described class of persons." Further this chapter deals with rules of law and not of construction like the previous chapter. A rule of law is "inflexible", *i.e.* operates invariably, and, so to speak, automatically whenever the limitations are such as to call for its application (a), in other words, it is independent of the wishes of the testator.

This section does not prohibit the making of a gift to an unborn person but says that such a gift can take effect only if the person described come into existence before the legacy is payable or takes effect in possession (b). Further restrictions have been imposed on a gift of this kind by the next two sections. The Exception to the section states that where a gift to a person described as standing in a particular degree of kindred to a specified individual is deferred by reason of a prior bequest (c) or otherwise (d), *i.e.* by reason of conditions imposed by the testator, such a gift will take effect if any person answering the description come into existence between the death of the testator and the time to which the possession of the gift is deferred.

Application of the section to Hindu Law. The principle of Hindu law requires that a person capable of taking a will must be such a person as could

(a) *Van Gullen v Foxwell*, 1897 A.C. 659, 672.
(b) *Mangamur* 157, 637. *Sorabji*.

Bom. L. R. 1099
illustr. ii, iii, iv
illustr. v

take a gift *inter vivos* and therefore must either in fact or in contemplation of law be in existence at the death of the testator' (a)

Where a testator after giving life estates in succession to his wife and two daughters directed 'that after the death of my daughters my grandson or grandsons whoever among them may be alive shall possess my properties for enjoyment during his or their lifetime and' after the death of my grandson all my properties will go to my father's family", that is to brother and nephew, and at the time of his death he had a grandson living held it was a valid bequest for life in favour of the grandson with remainder in favour of brother and nephew and it was not affected by the rules against remoteness or perpetuity (b)

The principle of Hindu law mentioned above is not infringed by the rule laid down in the section itself but the exception contemplates a power of disposition not allowed by Hindu law Accordingly it has been held that the exception as well as the two following sections are inoperative so far as Hindu wills are concerned though made applicable to them by Schedule III (c)

This conflict between the principle of Hindu law and the rule laid down in the Exception has now been removed by the Hindu Disposition of Property Act (XV of 1916 which does not apply to Madras) so that under that Act a Hindu is empowered to make a gift in favour of an unborn person and the gift will be good if such a person were to come into existence when the gift takes effect

Kindred On the meaning of the word see *Dines v Biraj* (d) This case is authority for the proposition that a gift in favour of a woman to be married by the testator's son or any other individual who was in existence at the time of the testator's death is valid

113. (S. 100) Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Bequest to person not in existence at testator's death subject to prior bequest

Illustrations

(i) Property is bequeathed to A for his life and after his death to his eldest son for life and after the death of the latter to his eldest son At the time of the testator's death A has no son Here the bequest to A's eldest son is a bequest to a

- (a) *Tagore Case* 9 B L R 377 but see *Najarchand v Ratanmala* 15 C W N 66 *Yethirajula v Akkuntlu* 23 M 363 15 M L J 299, *Dines v Biraj* 39 C 87, 15 C W N 945
- (b) *Dakshayani v Amrita* 23 C W N 826 But see *Nisar Ali v Muhammad Ali* 119 I C 337
- (c) *Alangamonjori v Sonamont* 8 C 637 *Ram Lal v Kanai Lal* 12 C 663, 669, *Raj Bishen Chand v*

- Asmalda* 11 I A 164 6 A 560 see *Dines v Biraj* 14 C L J 20 15 C W N 945 *Cally Nath v Chunder Nath* 8 C 378
- (d) 14 C L J 20 15 C W N 945 *Nasar v Ratanmala* 13 C L J 85 15 C W N 66, *Ramdulari v Bishweshwar* 69 I C 876 as to the general principles governing a gift to the wife of a person see J 373 sq 7 Ed

(ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

(iii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C has no son. Afterwards during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(iv) A bequeaths his estate of Green Acre to B for life, and at his decease, to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(v) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000 rupees.

The section. The section applies to the wills of Hindus, etc. The section is distinguished from S. 105 by the fact that the latter deals with the case of a legatee actually in existence at the date of will who, however, dies before the testator when, according to that section, the legacy will lapse. This section, on the other hand, contemplates a case where the legatee is not in existence and does not come into existence before the testator's death. Hence such a legatee can be referred to only by description and not by name. This section differs from S. 111 by the fact that this section deals with a bequest made to a person, the other with a bequest made "to a described class of persons". Further this chapter deals with rules of law and not of construction like the previous chapter. A rule of law is "inflexible", i.e., operates invariably, and, so to speak, automatically whenever the limitations are such as to call for its application (a), in other words, it is independent of the wishes of the testator.

This section does not prohibit the making of a gift to an unborn person but says that such a gift can take effect only if the person described come into existence before the legacy is payable or takes effect in possession (b). Further restrictions have been imposed on a gift of this kind by the next two sections. The Exception to the section states that where a gift to a person described as standing in a particular degree of kindred to a specified individual is deferred by reason of a prior bequest (c) or otherwise (d), i.e., by reason of conditions imposed by the testator, such a gift will take effect if any person answering the description come into existence between the death of the testator and the time to which the possession of the gift is deferred.

Application of the section to Hindu Law. The principle of Hindu law requires that 'a person capable of taking under a will must be such a person as could

(a) *Van Grutten v. Forwell*, 1897 A.C. 658, 672.

(b) *Alangamanjori v. Sonamant*, 8 C. 157, 637, see *Pullbai v. Sorabji*,

25 Bom. L. R. 1099

(c) See *illustrs.* ii, iii, iv

(d) See *illustr.* v

take a gift *inter vivos* and therefore must either in fact or in contemplation of law be in existence at the death of the testator" (a).

Where a testator after giving life estates in succession to his wife and two daughters directed "that after the death of my daughters my grandson or grandsons whoever among them may be alive shall possess my properties" for enjoyment during his or their lifetime and "after the death of my grandson all my properties will go to my father's family", that is, to brother and nephew, and at the time of his death he had a grandson living, *held*, it was a valid bequest for life in favour of the grandson with remainder in favour of brother and nephew and it was not affected by the rules against remoteness or perpetuity (b).

The principle of Hindu law mentioned above is not infringed by the rule laid down in the section itself, but the exception contemplates a power of disposition not allowed by Hindu law. Accordingly it has been held that the exception as well as the two following sections are inoperative so far as Hindu wills are concerned though made applicable to them by Schedule III (c).

This conflict between the principle of Hindu law and the rule laid down in the Exception has now been removed by the Hindu Disposition of Property Act (XV of 1916 which does not apply to Madras) so that under that Act a Hindu is empowered to make a gift in favour of an unborn person and the gift will be good if such a person were to come into existence when the gift takes effect.

Kindred On the meaning of the word see *Dines v Biraj* (d). This case is authority for the proposition that a gift in favour of a woman to be married by the testator's son or any other individual, who was in existence at the time of the testator's death, is valid.

113. (S. 100). Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Bequest to person not in existence at testator's death subject to prior bequest

Illustrations.

(a) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a

- (a) *Tagore Case*, 9 B. L. R. 377, but see *Nafarchand v Ratanmala*, 15 C. W. N. 66; *Yethirajulu v. Aikunthu* 23 M. 363, 15 M. L. J. 299; *Dines v. Biraj*, 39 C. 87; 15 C. W. N. 945;
 (b) *Dakshayani v. Amrita*, 23 C. W. N. 826. But see *Nisar Ali v. Muhammad Ali*, 119 I. C. 337
 (c) *Alangamonjori v. Sanamoni* 8 C. 637; *Ram Lal v. Kanai Lal* 12 C. 653, 659; *Rai Bhuben Chand v.*

- Asmalda* 11 I. A. 164 6 A. 360; see *Dines v. Biraj*, 14 C. L. J. 20, 15 C. W. N. 945; *Call, Nath v. Chunder Nath*, 8 C. 378
 (d) 14 C. L. J. 20, 15 C. W. N. 945, *Nafar v. Ratanmala*, 13 C. L. J. 85; 15 C. W. N. 66; *Ramdulat v. Bahadwar*, 69 I. C. 876 as to the general principle governing a gift to the wife of person, see J. 373 or 7 Ed.

person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void

(ii) A fund is bequeathed to A for his life, and after his death to his daughters A survives the testator. A has daughters some of whom were not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(iii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life, that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv). A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

The section The section applies to the wills of Hindus, etc. Cf. S. 13 Transfer of Property Act. The section has no application to wills made before the Hindu Wills Act (a). Law does not like the tying up of property for an indefinite period of time so as to render it inalienable. "From the earliest times the courts have always lent against any device to render an estate inalienable. It is the policy of law always to make estates alienable and it is immaterial by what device it is attempted to prevent an owner from exercising the right of ownership" (b). It has now become the settled rule that, "an estate for life may be limited to an unborn issue, provided the deviser does not go further and give an estate in succession to the children of such unborn issue" (c). As has been laid down in *Whitby v. Mitchell* (d), "you cannot have a possibility upon a possibility; or to state the rule in a more common form, that you cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers" *In Monypenny v. Dering* (e).

(a) *Dakshayani v. Amrita* 23 C. W. N. 826, 53 I. C. 779

(b) *Re Parny & Dagg*, 31 Ch. D. 130

(c) *Hay v. Cocentry*, 3 T. R. 83

(d) 44 Ch. D. 65; see *illust.* (i)

(e) 2 D. M. & G. 145

It has been stated, "Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to the unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon." This rule is variously described as the rule in *Whitby v Mitchell*, or the rule against double possibility, or the rule against remoteness.

Difference between the English rule and the Indian rule. Under the English rule "property may be given by will or secured by a settlement, to an unborn person for life or to several unborn persons successively for life, with remainders over, provided the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons". Therefore property cannot be given to A and then to his unborn son and then to his unborn grandson, but it can be given to A, then to his unborn son and then to the unborn son of B or to another person in existence, provided the remainder take effect within the period allowed by the rule against perpetuity (a).

The rule laid down in the section is much stricter, in as much as it says that a gift to an unborn person must embrace the whole of the testator's remaining interest, in other words, there can be no limitation after a gift to an unborn person, where the gift to the unborn person is subject to a prior bequest contained in the will. This section is to be read along with S 112 Exception and, in fact, it forms a qualification to the Exception. A gift to a person unborn at the time of the testator's death as contemplated by S 112 Exception is valid only when it is a gift not of a limited interest but of the whole remaining interest of the testator. It should be noted, however, that the words 'or otherwise' occurring in that Exception have been left out. Therefore in a case as contemplated by illust (v) to S 112, this section, if strictly construed does not apply. Further, the section deals with gifts of limited interests (in favour of unborn persons) which are to be distinguished from gifts with limitations or restrictions on enjoyment as contemplated by S 138. In English law the *cy pres* doctrine saves certain limitations which would have been void for infringement of this rule, e.g., in case of limitations to successive numbers of unborn persons and their respective issue, the court will construe the gifts as creating an estate tail (b), if the testator's intention be not frustrated thereby (c). But this being a rule of law is independent of the intention of the testator, accordingly such construction as above cannot be put upon a similar gift in this country.

By the Law of Property Act (12 & 13 Geo V c 13, S 16) an estate can now be given to an unborn person for life and then to his child or other issue, i. e., the rule in *Whitby v Mitchell* (d) has been abolished, provided the gift does not infringe the rule against perpetuities.

- (a) *Hampton v Holman*, 5 Ch D 184, *Walwright v Miller* (1897) 2 Ch 255, *Re Gage*, (1893) 1 Ch. 493
 (b) *Money Penny v. Dering* 2 D M & G. 145, *Parfitt v. Hember*, 4 Eq

- 443
 (c) *Re Mortimer*, (1905) 2 Ch 502, *Money Penny v Dering*, 2 D M. & G. 145
 (d) 44 Ch D 85 on app from Ch D 494

Application of the rules to the wills of Hindus, etc This section is made applicable to Hindu wills (see Schedule III) but has been held to be inoperative because of the rule of Hindu law prohibiting bequests in favour of persons not in existence (a) For an analogous provision, see Transfer of Property Act, S. 13 A gift by will to be valid under Hindu law must be upon an event which is to happen if at all, immediately on the close of a life in being, to a person in existence and capable of taking under the testator's death (b) The section is not affected by the Hindu Disposition of Property Act (V of 1916) The section applies to Parsis (c)

114. (101). No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity.

Illustrations.

(i) A fund is bequeathed to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25 A and B survive the testator Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator, such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B, and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B The bequest after B's death is void

(ii) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25 B dies in the lifetime of the testator, leaving one or more sons In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B a person living at the testator's decease All the bequests are valid

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters with a direction that, if any of them marry under age her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain

(a) See note last section; see *Raja Venkata v Raja Suranni* 31 M 321

(b) *Ram Lal v S of S. for India* 8 L A 45, 7 C 334; *Artisformoney*

v Narendra 16 C 393; *Nal Molicalu v Alambal* 21 B 707. *Tarakesur v. Sush* 9 C 932
(c) *Pullikal v. Sora* 45 M L J 720. 76 1 C 975

the age of 18 Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was All these provisions are valid.

1 **The section** The section applies to the wills of Hindus, etc Cf S 14 Transfer of Property Act The section lays down the well known rule against perpetuity Its object is, like that of the rule laid down in the preceding section, to restrain the creation of future conditional interests and thereby 'to prevent the mischief that would arise to the public from estates remaining for ever or for a long time inalienable or unascertainable from one hand to another' (a); 'property consists in a man's use, enjoyment and disposal, according to the laws of the community, of his acquisition in the external things around him' (b). Perpetuity is contrary to the scope and intention of Hindu law (c)

2 **Origin of the rule.** The rule of remoteness, or the rule against double possibility as it was called, which has been dealt with in the last section, was directed against contingent remainders in favour of successive generations of unborn persons. This rule did not go far enough, particularly when the Statute of Uses rendered executory limitations possible (d). So, further restrictions were imposed on attempts to create future estates fettering the right of alienation of property for an indefinite period The Chancellors after a series of decisions ultimately established the rule that property could not be tied up longer than a life or lives in being and 21 years after The theory underlying the rules laid down in this section and in the last one is the same, namely, that property shall be alienable, though it may be made inalienable to a certain extent in a peculiar way (e) 'The rule is founded upon considerations of public policy to prevent the mischief of rendering property inalienable unless for objects which are useful or beneficial to the community' (f)

3. **Various meanings of the term.** The natural and original meaning of a "perpetuity" is an inalienable and indestructible interest It has been used in connection with a series of estates in which successive heirs take estates for lives (g) or to denote certain trusts where no individual gets any benefit, e.g. to keep a tomb (not forming part of a church) in repair (h) But in the modern sense of the term, in which it is used in this section, it denotes an interest which will not vest till a remote period It therefore deals with interests to arise in the future and invalidates such as are not to vest within the period allowed by the rule (i)

- (a) *Stanley v. Leigh*, 2 P W 686, *Norfolk v Howard*, 1 Vern. 163, *Limji v Bapuji* 11 B 441, 447, *Yeap Cheah v Oug Cheng* L R 6 P C 381
 (b) *Kumara Asima v Kumara*, 2 B L R O C. J 11, 25
 (c) *Kumara Asima v Kumara*, 2 B L R O C. J, 11, 36
 (d) *Re Stamford & Warrington*, (1912) 1 Ch 343, 366; *Soudaminy v Jogesh*, 2 C 262
 (e) *Re Ridley* 11 Ch D 645, 649
 (f) *Yeap Cheah v Oug Cheng*, L. R.

- 6 P C 351 relied on in *Limji v Bapuji*, 11 B 441, 447; *Colgan v Adm. Genl*, 15 M 424, 436, 443
 (g) *Chudleigh's Case* 1 Co. Rep 113 b *Clare v Clare* Talb 21, 26
 (h) *Re Rigley's Trusts*, 36 L. J Ch 147, *Dawson v Small*, 9 Ch 651, *Re Rogerson* (1901) 1 Ch. 715, *Re Moore*, (1901) 1 Ch. 936
 (i) *Alangamonjori v So* 637

4 The English rule It has been thus stated (a) "Property cannot be tied up longer than for a life in being and twenty one years after This is called the rule against Perpetuities The term of 21 years may be slightly prolonged by the period of gestation where gestation actually exists The period of gestation may be added at both ends of the term of 21 years mentioned in the rule (b) By a process of legal refinement it has however been recently laid down that for the purpose of ascertaining the period of distribution of fund, the words born and living at the time of my decease do not include a child *in utero* but that for the purpose of ascertaining who is to participate in the gift they do include such a child, since it is for its benefit to be included' (c) Under the English law the vesting of an interest cannot be delayed beyond a fixed period of time

5 When time begins to run Time begins to run from the date the instrument takes effect As a will takes effect on the death of the testator, any gift made by it is void for remoteness if it does not necessarily take effect within 21 years from the termination of a life then in being (d) In case of a deed time begins to run from the date thereof (e)

6 Application of the rule An estate to take effect in future must vest, if at all, within the limits laid down by this rule It is not sufficient that it may vest within that period (f) Where the interest of the donee is not likely to vest or is not ascertainable within the period allowed by this rule, it is void (g) Thus the rule is infringed when an estate is given to those of a woman's children who reach 25, though the woman be past child bearing (h) It applies to immovable property (i), to personal property (j) to executory devises (k), to contingent remainders (l), to equitable interests (m) to a gift of profit where the estate also passes (n) to directions for accumulation without disposition of the corpus (o), to endowments for children under cloak of charity (p) Attempts by Hindu testators

- (a) *Re Ridley* 11 Ch D 645 see
Re Ashforth, (1905) 1 Ch 535
542
(b) *Villar v Gibbey*, 1907 A C 139
149
(c) *Villar v Gibbey*, 1907 A C 139
151
(d) *Hale v Hale* 3 Ch D 643,
Soudamney v Jogesh 2 C 262,
263, *Dungannon v Smith* 12 Cl
& F 546 574, *Caillin v Brown*
11 Hare 372, *Re Dawson* 39 Ch
D 155, *Gee v Liddell*, 2 Eq
341
(e) *Cadell v Palmer* 1 Cl & F 372
(f) *Dungannon v Smith* 12 Cl & F
546 600 613 See also *All v*
Muhammad Ali 119 1 C 337
(g) *Curtis Lukin* 5 Beav 147, 154,
156, *Sacill Bros Ltd v Belhell*,
(1907) 2 Ch 523
(h) *Re Merrick's Trusts* 1 Eq 551,
Gooder v Johnson 18 Ch D
441; *Re Dawson* 39 Ch D 155,
Smith v Smith 5 Ch 342
Anand Rao v Adm Genl., 20 B
450 460, *Cowaji v Rustomji*, 20

- B 511,
(j) *Jee v Audley* 1 Cox 324, *Colgan*
v Adm Genl 15 M 424 446,
see also cases cited above
(k) *Dungannon v Smith* 12 Cl & F
546 563 *Hancock v Watson*
1902 A C 14 17, *Kashinath*
v Chimanji 30 B 477, 490
(l) *Re Ashforth* (1905) 1 Ch 535
the application of the doctrine to
legal contingent remainders has been
criticised
(m) *Dungannon v Smith* 12 Cl & F
546
(n) *Sookhmoy v Manoharl* 11 C 684
Rameshwar v Lochmi 31 C 111,
Anand Rao v Adm Genl., 20 B
450
(o) *Kumar Asima v Kumar* 2 B L
R O C 11 *Arishnaramani v*
Ananda 4 B L R O C 231;
Promotha v Radhika 14 B L R
O C 175 *Kamini v Ashutosh*
15 I A 159 16 C 103
(p) *Chandramonay v Motilal* 5 C L
R 476; *Kamini v Ashutosh* 16
C 103

to restrict the right of alienation by prescribing the course of descent, the object being to create a perpetuity as regards the estate, are void (see paras 10 and 11).

7. Where the rule does not apply It does not apply to a contract unless it creates a limitation of property (a), to covenants binding lands (b), to vested interests like vested remainders or reversions (c), to limitations arising after determination of an estate tail (d), to provisions for payments of debts or incumbrances (e), to a gift over from one charity to another (f), to a gift to an individual followed by an executory gift over in favour of a charity or *vice versa* (g), to rights of reentry (h), to wills of Hindus made prior to the passing of the Hindu Wills Act (i) Where a testator devised property in trust for maintenance and support of his family and directed two distinct periods during each of which he wished the trust to be in force, one legal and other not, held, the trust would take effect during the period which was legal (j) The rule applies where vesting is postponed and not where the gift is immediate

8. Termination of interest. Although an interest is bad, if it does not vest within the limits laid down in this rule, it need not necessarily terminate within the same limits "The remoteness against which the rule for prevention of perpetuities is directed is remoteness in the commencement, or first taking effect of limitations, and not in the cesser or determination of them An estate that is to arise within the prescribed period, may be so limited as to determine on the happening of any event, however remote, as, for example, the indefinite failure of issue of a person" (k) Property may be given under English law to an unborn person for life or to several unborn persons successively for lives with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the period allowed by this rule (l), but a limitation in favour of the survivor of a number of persons all unborn is bad (m). A gift over that infringes the rule against perpetuity is void (n)

9. How to determine infringement of the rule In order to determine whether a particular gift in a will infringes the law against perpetuities,

- (a) *South E. Ry v. Associated Ec.* (1910) 1 Ch 12, *London S W. Ry Co v. Gomm.* 20 Ch D 562, 582, *Ramalinga v. Virupakshi* 7 B 338, *Kumar Asima v. Kumara* 2 B L R O C. 11
 (b) *Muller v. Trafford*, (1901) 1 Ch 54, 60
 (c) *Turney v. Turney*, (1899) 2 Ch 739
 (d) *Van Grutten v. Foxwell*, 1897 A C. 658, 679
 (e) *Re Stamford & Warrington*, (1912) 1 Ch 343 355
 (f) *Re Tyler*, (1891) 3 Ch. 252, *Christ's Hospital v. Granger*, 19 L J Ch 33
 (g) *Re Bowen*, (1893) 2 Ch 491; *Warrington Corn. v. Heather*, (1906) 2 Ch. 532, *Re Johnson's Trusts*, 2 Eq 716, *Falma B&I v. Adm Genl.* 6 B. 42, 49 50, but

- see *Jones v. Adm Genl.*, 46 C. 485, 509, see para (12)
 (h) *Re Tyrrell's Estate*, (1907) 1 Ir. 292
 (i) *Dakshayant v. Amrita*, 23 C. W. N. 826, 53 I C. 779
 (j) *Akshoda v. Nundo*, 4 C. W. N. 671 *Kheller v. Ganga*, *ibid.*, for meaning of family.
 (k) *Lewis on Perpetuity* cited in *Walwright v. Miller* (1897) 2 Ch 255, 251; *Wigan v. Clinch*, (1904) 2 Ch. 767; *Williams v. Teale*, 6 Harv 239 *Re Randell*, 35 Ch D 213
 (l) *Re Ashforth*, (1905) 1 Ch 535; *Casell v. Palmer*, 1 Cl & F. 372; *Re Hargreaves* 43 Ch. D 421
 (m) *Re Hargreaves*, 43 Ch. D 421; *Re Ashforth*, (1905) 1 Ch. 535
 (n) *Re Blunt's Trusts*, (1904) 2 Ch. 767

the law is not to be imported into the consideration of the instrument (a) but the instrument is to be construed without reference to the rule respecting remoteness, that is, in the first instance for the sole purpose of ascertaining the testator's meaning. The construction is not to be varied in order to avoid the effect of the rule (b).

In applying this rule the court must look not at events which have actually happened, but at the events which might have happened. If the limitations are such that events might have so turned out that the rules as to remoteness would have been infringed then the limitations fail although in the events which actually did happen the legal period was not exceeded. In other words possible and not actual events are to be considered (c). Again, in applying the rule a distinction has to be drawn between the vesting of the interest and the postponing of possession or enjoyment (d). The latter may have the effect of preventing the vesting of the estate in the legatee, in which case the gift will be void (e) or it may not have that effect when only the direction will be void (f).

Where there is a clause in a will which is obnoxious to the rule against perpetuities, the limitations contained in it and all other limitations dependent upon it will be bad and must fail, but they are none the less parts of the testator's will and are to be resorted to as part of the context for all purposes of construction as if no such rule has been established (g). The rule against perpetuities therefore, "is not a rule of construction, not a test more or less artificial, to determine intention but an absolute inflexible rule of law one of the legacies of the Middle Ages, the object of which is to defeat intention" (h).

10 English and Indian law compared. It has been stated that the English law lays down a fixed period within which all estates are to vest that period being the lifetime of one or more persons and a further term of 21 years a term in gross and counted irrespective of the infancy of any person interested in the property, whereas the section lays down that after the lifetime of an existing person or the lifetimes of any number of existing persons property may be tied up during the minority of some persons in existence at the expiration of that period. The Indian law further requires the property to go to the benefit of the person during whose minority the property is tied up but the English law does not. Though minority as defined in S. 2 (e) may in some cases extend to 21 years, yet if a gift over after a life estate be postponed till the remainderman attains 21, the gift over will be bad, for that definition has not altered the law as laid down in the section (i).

(a) *Pearks v Moseley* 5 A C 714 719, 733

(b) *Dungannon v Smith* 12 Cl & F 546 578 588 599, *Calvin v Brown* 11 Hare 372, *Cunliffe v Branker* 3 Ch D 393 399, *Harvey v Stracey* 1 Dr 73, 126

(c) *Dungannon v Smith* 12 Cl & F 546, *Re Wilmer's Trusts* (1903) 2 Cl 411 422, *Soudaminney v Jagesh* 2 C 262, *Rajmoojee v Trojluke* 29 C. 260, *Ramgoollee v Aris's* 20 W R 472, *Kashinath*

v Climanji, 30 B 477, 491
(d) See S. 115 note

(e) *Boughton v Boughton*, 1 H L C 406, *Re Wrightson* (1904) 2 Ch 95

(f) *Kevern v Williams* 5 Sim 171, *Harrison v Grimwood* 12 Bear 192

(g) *Heareman v Pearce* 7 Ch 275 283

(h) *Mukhopadhyaya Perpetuities*, see *Jan Cruken v Foxwell* 1897 A C 658

(i) *Sundararajan v Natarajan* 44 ML 446, *Soudaminney v Jagesh*, 2 C. 262

The Hindu law is much more stringent. That law requires the legatee to be in existence during the lifetime of the testator. If he come into existence after the death of the testator but before the death of the aftertaker, the gift to him will be void (a). Accordingly a gift over upon an indefinite failure of issue has been held void (b). As has been pointed out a disposition valid under this section may be declared invalid under Hindu law although the section is made applicable under Schedule III to Hindu wills, but a disposition invalid under this section can never be validated by Hindu law (c).

The provisions of this section have not been affected by the Hindu Disposition of Property Act (XV of 1916).

11. The law prior to the passing of the Hindu Wills Act. Prior to the passing of the Hindu Wills Act it was laid down that the English law of perpetuities could not be engrafted upon a Hindu will as it was a rule of a technical character (d). But it was also observed (e) that, 'The creation of a perpetuity is unknown to Hindu law and is contrary to its general principles, to allow and support perpetuities is against public policy, and is generally mischievous. It ought not upon general grounds of public policy and convenience to be permitted' and the section was deemed as being quite in accordance with the general spirit of the Hindu law. The *Tagore Case* (f), however, has set limits to the testamentary capacity of Hindus with regard to the creation of future estates by requiring the legatee to be in existence during the lifetime of the testator and these limits are obviously narrower than those set by this section so the section though embodied in the Hindu Wills Act has been rendered practically inapplicable to Hindu wills.

12. Gifts to charities. It has been said before that the term 'perpetuity' is used to denote an inalienable and indestructible interest as also a period within which a particular gift must take effect. Charities are not affected by perpetuity in the former sense therefore if a charity has got a present or vested interest, that interest may continue ever so long (g). But if it be possible that the gift to a charity may not vest within the period allowed by the law, the gift will be bad (h), unless the prior gift was also to a charity (i). But in this country it has been held that a gift to a charity followed by a gift to another upon the happening of a specified uncertain event (which may not necessarily vest within

(a) *Tagore Case*, 9 B. L. R. 377.
Soudaminy v Jogesh 2 C. 262.
Kherodemonj v Doorgamoney 4 C. 455, *Jairam v Kuverbal* 9 B. 491, *Alangamonjori v Sonamoni* 8 C. 637.

(b) *Lalit v Chukkun* 24 C. 834.
Soorjemonj v Deenobundoo 9 M. I. A. 123, 6 M. I. A. 526.
Ram Lal v Kanat Lal 12 C. 663, 669, *Jairam v Kuverbal*, 9 B. 491, *Anand Rao v Adm. Genl.* 20 B. 450, *Cally Nath v Chunder Nath* 8 C. 378.

(c) *Siva Sankara v Soobramania* 31 M. 517, 521.

(d) *Kumara Astma v Kumara* 2 B. L.

R. O. C. J. 11 32, *Bhoobunmoyee v Ram Kishore* 10 M. I. A. 279.

(e) *Krishnamani v Ananda* 4 B. L. R. O. C. J. 231, 292.

(f) 9 B. L. R. 377.

(g) *Goodman v Saltash Crop* 7 A. C. 633, 642, 650, *Re Christ Church, &c.* 38 Ch. D. 520, *Re Bowen* (1893) 2 Ch. 491.

(h) *Chamberlayne v Brockell* 8 Ch. 206, 211, *Re Bowen* (1893) 2 Ch. 491, *Re Stratheden & Campbell* (1894) 3 Ch. 265, *Re Swain*, (1905) 1 Ch. 669.

(i) *Re Tyler* (1891) 3 Ch. 252.

the period allowed by the rule) is void for remoteness. The English law has no application as the Indian law makes no distinction between charities and individuals (a)

13 Meaning of charity Charity, in law, does not mean a gift out of affectionate regard for an individual nor a gift in relief of the poor (b). It can best be described in the words of Lord Macnaghten as follows—'Charity in its legal sense comprises four principal divisions (a) trusts for the relief of poverty (b) trusts for the advancement of education, (c) trusts for the advancement of religion, (d) and trusts for other purposes beneficial to the community and not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do directly or indirectly' (c). A gift for *dharam* is not necessarily a charitable gift as it is too general and vague for the court to enforce (d). To support the validity of an endowment it must be shown that (1) an absolute grant of the lands was made with the intention that the properties should be applied to the purposes of the endowment, (2) that the properties have since the grant been so applied, and (3) that the members of the family of the settlor have not treated the property as one the profits of which were mainly intended to be applied for their own benefit (e).

A gift to charity to be valid, the object of the charity must be of a public nature (f), i.e., that the community as a whole or some definite portion of it must be benefited (g), it is immaterial whether the portion of the community is restricted (h) provided it is not restricted to specified individuals (i). But a gift for founding a private museum (j), or for the spiritual benefit of the donor and his family (k), or for the repair of a tomb (l), is not a charitable bequest. An immediate gift for charitable purposes is not invalidated by the fact that the particular application directed cannot immediately take effect (m).

It should be noted that the word 'charity' has not been defined by the Act S 118, which speaks of religious or charitable bequests has not been made applicable to the wills of Hindus. S 17 of the Transfer of Property Act gives an indication

- (a) *Jones v Adm Genl*, 46 C. 485, 509 sq.
- (b) *Morice v Bishop of Durham* 9 Ves. 339, 10 Ves. 522. *Hunter v A G*, 1899 A C 309. *Blair v Duncan* 1902 A C. 37, 43.
- (c) *Commissioners &c v Pemsel*, 1891 A C 531, 583. see *University of Bombay v Municipal Commissioners &c* 16 B 217. *Colgan v Adm Genl* 15 M 424, 444.
- (d) *Runchordas v Parvatibhai* 26 I A 71, 23 B 725.
- (e) *Thakur v Atkins* 4 Pat. L. J. 533.
- (f) *Goodman v Saltash Corp* 7 A C. 633, 650; *Re Christ Church &c* 35 Cl. D 523, 532. *Limji v Bapuji* 11 B 441.

- (g) *Re Foreaux* (1895) 2 Ch 501.
- (h) *Bristol v Bristol* 5 Beav. 289. *Re Estlin* 72 L. J. Ch. 687. *Re White's Trusts* 33 Ch. D 449. *Re Mann* (1903) 1 Ch. 232.
- (i) *A G v Pelree* 2 Atk. 87. *Fatma Bhee v Adm. Genl* 6 B 42. *Limji v Bapuji* 11 B 441. *Colgan v Adm Genl* 15 M 424.
- (j) *Fowler v Fowler* 33 Beav. 616.
- (k) *Yeap Cheap v Oug Cheng L R* 6 P. C. 381. *Limji v Bapuji* 11 B 441.
- (l) *Re Rogerson* (1901) 1 Ch. 715. *Re Moore* (1901) 1 Ch. 936.
- (m) *Hallis v Sol Genl*, 1903 A. C. 173, 186. *Stinnett v Herbert* 7 Ch. 232.

of the sense in which the term has been understood by the Legislature, a sense substantially in accord with the sense in which the term is used in English law (a).

14. Religious and charitable trusts In England there is a distinction between charitable and religious trusts, the latter being subject to the Statutes of Mortmain (b) and also to other rules invalidating all gifts to superstitious uses (c); otherwise gifts for religious purposes are charitable gifts (d).

A gift to a religious charity is subject to a further qualification that the gift must not be for the benefit of private individuals under cover of a religious trust. The court will hold the gift to be void in so far as it is a gift to an individual and an attempt to create a perpetuity (e). In such a case the question arises whether there is a complete dedication to the idol in which case the gift to that extent, at any rate will be good, or it is a gift to individuals under the guise of a religious endowment (f). A gift may validly be made to a private family deity (g). But whether a gift is to an idol or to individuals subject to a charge for the performance of religious worship is a question of construction (h).

But the rule as regards the invalidity of superstitious gifts does not prevail in this country (i). In as much as Hindus and Muhammadans have their respective personal laws preserved to them, the law as regards the invalidity of bequests for superstitious uses has not been applied here as strictly as in England in cases of gifts to religious objects (j). But the law has not been similarly relaxed in case of gifts by Parsis (k), or by Armenians (l). Gifts for charitable and religious purposes have been recognised in this country (m).

(a) Cf. Indian Trusts Act (II) of 1882, S. 1)

(b) *Mukhopadhyaya Perpetuities*, 226

(c) *Heath v. Chapman*, 2 Dr 417, 424

(d) *Re White*, (1893) 2 Ch 41, 53; see *Re Maddaf*, (1896) 2 Ch 451, 465, 474

(e) *Chandramoney v. Molal*, 6 C. L. R. 496; *Dwarkanath v. Burroda*, 4 C. 443; *Kamini v. Asulosh*, 16 C. 103; see *Rameshwar v. Lachmi*, 31 C. 111, 7 C. W. N. 698

(f) *Promotho v. Radhika*, 14 B. L. R. 175; *Ashulosh v. Durga*, 5 C. 438; 6 I. A. 182; *Brojsoondree v. Luchmee*, 20 W. R. 95; *Sonaton v. Juggulsoondree* 8 M. I. A. 66; *Sookhmoy v. Monohari*, 12 I. A. 103, 11 C. 634, 7 C. 269; *Surendra v. Doorga*, 19 I. A. 108; 19 C. 513; *Ram v. Ranjit*, 27 C. 242; *Hara v. Basanta*, 9 C. W. N. 154; see *Lalit v. Chukkun*, 24 I. A. 76, 24 C. 834; 20 C. 906; *Anand Rao v. Adm. Genl.*, 20 B. 452.

(g) *Rupa v. Krishnaji*, 9 B. 169

(h) *Har Narayan v. Surja*, 43 A. 291 P. C.; see *Bidhu v. Kuladaprasad*, 46 C. 877, 885

(i) *Das Mercers v. Cones*, 2 Hyd. 65; *Andrews v. Joakim*, 2 B. L. R. O. C. 148; *Jodah v. Jodah*, 5 B. L. R. O. C. 1433

(j) *Mullick v. Mullick*, 1 Knapp 245; *Falma Bibee v. Ado Genl* 6 B. 42; *Haji Abdul v. Haji Hamid*, 5 Bom. L. R. 1010; *Juggulmohini Sookheemoney*, 14 M. I. A. 289; *Jamshedji v. Soonabat*, 33 B. 122

(k) *Limji v. Bapuji*, 11 B. 441

(l) *Colgan v. Adm. Genl.*, 15 M. 424

(m) *Sonaton v. Juggulsoondree*, 8 M. I. A. 66; *Kumara Asima v. Kumara*, 2 B. L. R. O. C. 11; *Haji Abdul v. Haji Hamid*, 5 Bom. L. R. 1010; *Falma Bibee v. Ado Genl* 6 B. 42; *Colgan v. Adm. Genl.*, 15 M. 424; *Bhagobuttu v. Gooroo Prosonno*, 25 C. 112; *Das Mercers v. Cones*, 2 Hyd. 65; *Krishnamant v. Ananda*, 4 B. L. R. O. C. 1231.

(ii) The power must be capable of being exercised within the period (a)

In the case of a special power, time begins to run from the date of the testator's death or creation of the power according as the power was created by a testamentary or non testamentary instrument (b) Therefore the power must be exercised within the period allowed by the rule counted from the date it takes effect and the objects of the power must be ascertained within the period of perpetuity (c)

Where power is given to a number of persons but it is several & exercisable by one or more and not necessarily by all, then if its exercise by some be affected it can be validly exercised by the rest (d).

A power of appointment can be exercised by a Hindu provided the appointee is a person who was in existence at the time of the testator's death (e)

19. More persons The contingency may be postponed for any number of lives, provided they are all in being when the contingent interest is created. It is not necessary that those persons should have any interest in the estate. As has been said, "the number of co existing lives is a matter of no moment in fact the life of the survivor of many persons named or described is but the life of one" (f)

115 (S. 102.) If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be void in regard to those persons only and not in regard to the whole class

Illustrations

(i) A fund bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children therefore, is inoperative as to any child born after the testator's death and in regard to those who do not attain the age of 25 within 18 years after A's death, but is operative in regard to the other children of A.

(ii) A fund is bequeathed to A for his life and after his death to B, C, D and all other children of A who shall attain the age of 25. B, C, D are children

- (a) *Bandon v Moreland*, (1910) 1 Ir 220. *Sica Sankara v Soodramania*, 31 M. 517 4 M. L. T. 306
(b) *Re Thompson* (1906) 2 Ch 199
(c) *Blight v Hartnoll* 19 Ch D 294, *Re Norton* (1911) 2 Ch 27; *Slark v Dakyns* 10 Ch 35
(d) *Attenborough v Attenborough* 1 K. & J. 296, *Re Abbott*, (1893) 1

- Ch 54 60, *Bandon v Moreland* (1910) 1 Ir 220
(e) *Dal Mollicahoo v Mamubal* 24 I A 93, 21 B 709
(f) *Thellusson v Woodford* 4 Ves 112, *Cadell v Palmer* 1 Cl & F 372, *Pennell v Graham* 33 Bea 242

of A living at the testator's decease. In all other respects the case is the same as that supposed in *Illustration (i)*. Although the mention of B, C and D does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children B, C or D, who attains the age of 25 within 18 years after A's death.

1. Change. The section was introduced in the Succession Act (of 1925) by the Transfer of Property Amendment Act (XXI of 1929). Previous to the amendment the old section stood as follows:—

Bequest to a class
some of whom may
come under rules
in sections 113 and
114

115. If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be wholly void.

Illustrations.

(i) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death, and, as it is given to all his children as a class it is not good as to any division of that class but is wholly void.

(ii) A fund is bequeathed to A for his life, and after his death to B, C, D and all other children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in *Illustration (i)*. The mention of B, C and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.

2 The section. The section applies to the wills of Hindus *etc.* Of S. 15 Transfer of Property Act. S. 111 deals with the case of a gift to a class, but there the reference is to a class existing at the testator's death, or, where possession is deferred, to a class coming into existence when the gift takes effect, *e g* at the expiry of a previous life estate, so that no question of remoteness arises under that section. This section applies to two cases, *viz*, (1) to a case of a gift to a class some members of which are not in existence at the testator's death and to which class the testator has not given the whole of his interest so that the rule in S. 113 is infringed by the gift, or, (2) where the rule against perpetuity (S. 114) is infringed, *e g*, where there is a gift to a class some members of which may not be ascertained within the period allowed by that rule. In either of these two cases, according to the section as amended, the whole gift does not become void. It will be void with regard to those only to whom it is inoperative and not in regard to the whole class. According to the law as it stood prior to the amendment the gift to the whole class was bad. The law as laid down

In the present amended section is the result of the following stages of development which have to be considered —(1) the law under the old section, (2) the law after the passing of the Hindu Wills Act, (3) the law after the decision in *Bishen Chand v Asmaida Koer* (4) the law after the decision in *Soundararajan v Natarajan* and (5) the present law

3 Rule against perpetuity The rule against perpetuity affects not only a gift to an individual but also invalidates a gift to a class if the members thereof be not ascertained within the period allowed by the rule (a) Thus where there was a gift to an unborn person for life and then to the children of A a living person share and share alike, and to the child or children of such of the said children as shall then be dead this was a gift to the children of A as a class with substitutionary gifts in favour of grandchildren and therefore void *Malins V O* observed (b) Property may be given by will or secured by settlement to an unborn person for life or to several unborn persons successively for life with remainders over provided the vesting of the remainders or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons And again following *Cadell v Palmer* (c) 'you may postpone the vesting of property during a life or lives in being and the period of 21 years in gross afterwards but every gift which must not necessarily vest within that period is void A gift therefore to take effect at the expiration of lives not yet in being must necessarily be void A gift to persons composing a class to be ascertained at a time beyond the period allowed by the rule against perpetuity is bad (d) Where however, the class is composed of living persons the gift is not necessarily void (e)

4 The rule in *Leake v Robinson* (f) The old section was based on the decision in *Leake v Robinson* The rule embodied in the decision is known as the rule in *Leake v Robinson* In that case the testator gave stocks and moneys to A for life and after his death to the children of A who being a son or sons should attain the age of 25 years or being a daughter or daughters attain that age or be married with consent and in case A died without issue living at the time of his death or leaving issue should they die before that age if sons or if daughters should they die before attaining that age or before marriage as aforesaid then to the brothers and sisters of A on attaining such age or on marriage as aforesaid In the actual events five of the brothers and sisters of A were born in the lifetime of the testator and the question arose whether the gift was good as to these and void as to the rest It was held that the gift was bad as a whole The bequests in question are not made to individuals but to classes and what I have to determine is whether the class can take I must make a new will for the testator if I split into portions his general bequest to the class and say that

- (a) *Boughton v Boughton* 1 H L C 406
Stuart v Cockrell 7 Eq 363 5 Ch 713
Bligh v Harriott 19 Ch D 294
Re Gage (1893) 1 Cl 493 J 300 nq 7 Ed
 (b) *Stuart v Cockrell* 5 Cl 713
Dodd v Wake 6 Sm 615
Boughton v Boughton 1 H L C.

- 406
 (c) 1 Cl & F 372
 (d) *Jee v Audley* 1 Cox 324
Lell v Randall 3 Sm & G 83; *Re Harvey* 39 Ch D 289; *Re Bence* (1891) 3 Cl 242
 (e) *Eachian v Reynolds* 9 Hare 796.
 (f) 2 Mer 363

because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequest what he never intended them to be, namely, a series of particular legacies to particular individuals, or what he had as little in contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death". The rule has been thus summed up by Lord Selborne; "The rule is that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of the members" (a) The rule has been discussed in the cases noted below (b).

The rule was therefore well established that where there was a gift to a class but some members could not be ascertained within the period allowed by the rule against perpetuities, the gift to the whole class failed, the reason being that the court would not make a division of the gift when persons who were to take and the proportions in which they were to take according to the intention of the testator could not be given effect to (c). But if members can be ascertained within the period the gift will be good (d). In applying the rule against perpetuity possible and not actual events have to be considered (e)

5 Exceptions to the rule (f) The following exceptions were recognised to the operation of the rule as laid down in the section repealed which declared the whole gift to be bad (see ante para 1) The rule did not apply, (1) where the gift did not vest in the class at the same time, for in case of a gift to a class the interest of all the members must vest at the same time (g), (2) where the class could be ascertained within the period allowed by the rule against perpetuity, e.g., at the testator's death (h), (3) where the gift was by way of a legal contingent remainder (i), (4) where the enjoyment and not the vesting of the interest was postponed till a certain age (j) "It is the period of vesting and not the description of the legatees that produces the incapacity" (k), (5) where independent gifts were made to the members of a class, e.g., where a testator bequeathed £500 to each child that might be born to either of the children of either of his brothers (l), (6) where a time was fixed at which a fund was to be divided into separate shares and that time was not obnoxious to the rule against perpetuities, each share stood separate from the others and would take effect or not according as the disposition of that share did or did not

- (a) *Pearks v Moseley* 5 A C 714
 (b) *Hale v Hale*, 3 Ch. D. 643, The rule has been followed in *Newman v Newman* 10 Sim 51, *Walker v Mower*, 16 Bear 365, *Merlin v Blagrace*, 25 Bear 125; *Smith v Smith*, 5 Ch 342 J 305, 7 Ed
 (c) *Hale v Hale* 3 Ch D 643, *Smith v Smith* 5 Ch 342, *Savill Bros Ltd v Bethell*, (1902) 2 Ch 523, *Re Thompson*, (1906) 2 Ch 199
 (d) *Seaman v Wood*, 22 Bear 591, *Pearks v Moseley*, 5 A C 714
 (e) *Rafomoyee v Troyluckho* 29 C. 260, 6 C. W. N 267, 278.
 (f) *Mukhopadhyaya, Perpetuities*, see *Callin v Brown*, 11 Hare 372.

- (g) *Kingsbury v Walter*, 1901 A C 187, 194
 (h) *Picken v Mathews*, 10 Ch D 264, *Von Brockdorff v Malcolm*, 30 Ch D 172, *Re Powell*, (1892) 1 Ch 227
 (i) *White v Summers*, (1908) 2 Ch 256, *Re Finch*, 17 Ch D 211
 (j) *Saumarez v Saumarez* 34 Bear 432, *Re Turney*, (1897) 2 Ch. 739
 (k) *Leake v Robinson*, 2 Mer 363
 (l) *Storr v Benbow*, 3 D M. & G. 390; *Boughton v Boughton* 1 H. L. C. 406, *Williamson v Dunc* 30 Bear 111

violate the rule against perpetuities (a) (7) in case of substitutionary gifts *eg.* where an absolute gift to children which was good was followed by a gift to their children in case of death of any child of the testator the gift to the grand children might be bad and if substitutionary it alone would be void (b) (8) where a gift was made to depend on more than one contingency some of which were good and some were too remote the gift would be good (c) (9) where the gift was not to a class but to a series of persons and each beneficiary took successively because he bore a particular character or answered to a certain description or filled a specified position then the first members might take if their interests were severable and not too remote (d) (10) a gift of right of residence is not a gift to a class because each has a distinct and independent right to reside and the number of persons who may ultimately belong to the class is in no sense regarded as a criterion of the interest which each takes (e) (11) a gift to named individuals is not ordinarily a gift to a class (f)

Even in England the rule in *Leake v Robinson* has been followed not without expressions of reluctance and the opinion has been expressed that it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess where that excess could be clearly ascertained. But the rule was too firmly established to be altered or set aside except by legislation (g). This was the rule that was introduced into this country by the Succession Act of 1865.

6 The application of the rule to Hindu Wills After the passing of the Hindu Wills Act the rule was made applicable to the wills of Hindus (i). Courts even went further and observed that the testamentary capacity of the Hindus has to be restrained and not extended and therefore English decisions which lay down that where there are certain members of the class alive at the testator's death who can take then they will do so and the estate will open out for each fresh member of the class as occasion arises—a view supported by the observations of the Privy Council in the case of *Soorjeemoney v Denobindoo* (i) as explained in the *Tagore* case (j)—were declared to be wholly unsuited to the wants and habits of the people of this country and the rule in *Leake v Robinson* (k) was applied and the gift held to be void (l).

- (a) *Benlinc v Duke of Portland* 7 Ch D 693 698, *Re Coulman* 30 Ch D 186 *Re Russell* (1895) 2 Ch 698
 (b) *Goodier v Johnson* 18 Cl D 441, *See Packer v Scott* 33 Bear 511
 (c) *Moncypenny v Deiring* 2 D M & G 145, *Leake v Robinson* 2 Mer 363 394 *Miles v Hafford* 12 Ch D 691 *Re Bowles* (1905) 1 Ch 371 *Re Davies & Kent's Contract* (1910) 2 Ch 35
 (d) *Tollemache v Coventry* 2 Cl & F 611; *Ibbelton v Ibbelton* 10 Sm 495 *Dungannon v Smith* 12 Cl & F 545 *Liley v Hey* 1 Ha 58 *Re Gage* (1873) 1 Ch 458 *Re Hill* (1902) 1 Cl 537 837 *Arundhanath v Atma am* 15 B 543 545

- (f) *Sallay Mahomed v Lady Sanbal* 3 Bom L R 785
 (g) *Bhagaball v Kali Charan* 32 C 992 affd 30 1 A 54 The rule in *Leake v Robinson* has been virtually abolished by 5 Geo V c 20 s 163
 (h) *Bramamayi v Jages* 8 B L R 400 *Soudamney v Jogesh* 2 C 262
 (i) 9 M 1 A 123
 (j) 9 B L R 377
 (k) 2 Mer 367
 (l) *Kherodmoney v Doorgamoney* 4 C 455, *Jatram v Kucchal* 9 B 491 5 B *Bajanath v Anandamayi* 8 B L R 205, *Rajamoyes v Troyluckho* 29 C 260 6 C. & N 267 *Clundamoney v Matlal* 5 C. L R 496

The rule against perpetuity, it may be noted, is infringed even if some members of the class do not come into existence within the period allowed by the rule, or as has been said, 'where there is a gift to a class, and some persons constituting that class cannot take in consequence of remoteness, the whole bequest must fail, .. in deciding questions of remoteness regard is to be had to possible and not to actual events' (a).

The rule *Leake v. Robinson* was thus applied to the case of Hindu wills where a testator made a gift to a class of persons of whom some were and some were not in existence at the date of the gift, but the tide turned after the decision of the Judicial Committee in *Rai Bishen Chand v. Asmatda Koer* (b) and the principle of the decision has been followed in a large number of cases in India. In that case the *Karta* of a joint family governed by the Mitakshara law in pursuance of a family arrangement with the consent of his son made over by a deed of gift the whole of his ancestral property to his grandson including with him possible brothers that might be born thereafter. Their Lordships declared the gift to the grandson to be good, even though there was a further gift to his brothers who might be born after the death of the testator. Their Lordships declared that this section of the Succession Act held a gift to be void not in all cases but only when the bequest offended against the rules contained in the two previous sections. Illustration (b) now (ii) to the section in the Succession Act imported into India an English rule of construction (as laid down in the case of *Leake v. Robinson*) which usually defeated the intention of the testator and was out of place. Lastly, "Cases are not rare in which a Court of Construction, finding that the whole plan of the donor of the property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that, if (the grandson's) possible brothers are not to take by virtue of the gift, he shall take the whole. He is there present, and able to receive the gift. He is an individual designated in the deed." Effect therefore was given to the intention of the settlor as far as possible.

The above case though dealing with settlement by a deed *inter vivos* was applied to a case of testamentary gift (c) and the principle was laid down that if the plan be to give a present gift to persons capable of taking, that gift is effective, although it was also intended that other persons incapable of taking should afterwards come in and share in the gift. 'The rule in *Leake v. Robinson* is meant to guard against remoteness, but there can be no question of remoteness when persons not ascertained at the testator's death are debarred from taking. The rule very often frustrates the intention of the testator and is most inappropriate in this country where joint family is the rule." Lastly, the observation of Jessel M. R. in *re Coleman and Jarrom* (d) was cited with approval, viz., "The testator may be considered to have a primary and a secondary intention. His primary intention is that all the members of the class shall take, and his secondary intention is, that if all can not take, those

(a) *Soudamney v. Jagesh*, 2 C. 262.
Jalram v. Kuceral, 9 B. 491, 509.
 (b) 11 1 A. 164, 6 A. 560.
 (c) *Ram Lal v. Kanai Lal*, 12 C.

663, see *Bhagabati v. Kali Charan*
 32 C. 992.
 (d) 4 Ch. D. 167.

that age to B A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons as shall first attain the age of 25, which bequest is void under section 114 The bequest to B is void

1. **Change** The above section was substituted by the Transfer of Property Amendment Supplementary Act (XXI of 1929) in place of the following section in the Succession Act (XXXIX of 1925) —

116 Where a bequest is void by reason of any of the provisions of section 113, section 114, or section 115, any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void

Same illustrations as above

2. **The section.** The section applies to the wills of Hindus, etc Of S 16 Transfer of Property Act It will be noted that in the amended section, reference to S 115 has been omitted Since the whole gift does not become void under the previous section as it now stands, a limitation consequent upon such a gift cannot be wholly void The amendment of this section therefore is a necessary consequence of the amendment of the previous one The operation of this section is now confined to limitations rendered void by Ss 113 and 114, i e, where there is a gift to a person not in existence to whom, however, the testator has not given the whole of his interest (S 113), or, where the rule against perpetuity is infringed (S 114) In these two cases, which are specifically mentioned by this section, and in no others, all subsequent limitations dependent upon and intended to take effect after such void prior bequests are also void (a) Thus in *Proctor v Bishop of Bath and Wells* (b) there was a gift to the first or other son of A who should be bred a clergyman and to his heirs but if A should have no such son, then to B and his heirs A died without issue The gift to B was void, the court refused to divide the contingency on which he was to get, viz, on failure of issue of A and on A's son taking holy orders, which he could not do before he attained 24 The court observed, 'there was no instance in which a limitation after a prior devise, which was void from the contingency of being too remote, had been let in to take effect'

Where, however, a testator has provided a double contingency or alternative events on the happening of any one of which a gift over was to take effect, then if the contingency which has actually happened be not void for remoteness (although the other may be so) the gift over will take effect (c)

3 **The rule** 'It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid The reason appears to be that the persons entitled under the subsequent limitations are not intended to take unless and until the prior limitation is exhausted and as the prior limitation which is void for remoteness can never come into operation much less be exhausted,

(a) See *Rat Bishen Chand v Asmalda Koer*, 11 I A 164, 6 A 560

(b) 2 H Bl 358

(c) *Money Penny v Deing*, 2 D M & C 145; *Hodgson v Halford*, 11

Ch D 959, *Re Bowles* (1905)
1 Ch 371, *Miles v Horsford* 12
Ch D 691, *Javerbal v Kashtal*
16 B 492, 497

It is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitations (a) The rule is independent of the intention of the testator It follows from the infringement of the rule against perpetuities which regards possible and not actual events (b) The rule applies though the gift over be to a person in existence (c)

4 Indian decisions Where a prior gift is void the ulterior gift has also been held to be void (d) Where a testator empowered his widow to adopt and directed that in case the adopted son died without issue the property was to be divided among his daughters the adoption having proved invalid the gift over in default was held to be good in as much as none of the sections 113 114 (and old section 115) had been infringed (e) Similarly where a prior gift failed for non registration under the Oudh Estates Act (I of 1869) the later gift was not invalidated (f) Where there are two intentions wholly separable the second one not depending on the first, it is possible to give effect to the first (g) If the prior gift be void for remoteness and there are not two or more intentions expressed in the will the limitations expectant on such an invalid devise will be void (h)

5 Failure of subsequent limitations A prior limitation is not affected by the subsequent limitations becoming void (i) The ulterior estate on such failure goes to the residuary legatees (j) unless the testator has otherwise provided (k) In cases of special powers the estate goes to persons who are entitled in default of appointment (l) On failure of a gift the directions of the testator in connection with the gift do not fail if the two are not inextricably mixed up (m)

117 (S. 104) (1) Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof

(a) *Re Abbott* (1893) 1 Ch 54 57, see *Money Penny v Dering* 2 D M G. (182)

(b) *Soundararajan v Natarajan* 52 I A 310

(c) *Re Thatcher's Trusts* 26 Beav 365 *Re Morfimer* (1905) 2 Ch 502 J 326 sq 7 Ed

(d) *Tagore case* 9 B L R 377

(e) *Radha Prasad v Ramee Mani* 33 C. 947, 952 10 C. W N 695

(f) *Ajudhia v Rakhman* 11 I A. 1 10 C. 432

(g) *Rai Kishori v Debendra* 15 I A 37, 15 C 409 416.

(h) *Brajnath v Anandamayee* 8 B L R. O C. J 208, 223

(i) *Tagore case* 9 B L R. 377 *Takeswar v Soshi* 10 I A 51 9 C 952 *Kristoromoney v Norendra* 16 I A 29 16 C. 383 *Rameshwar v Lachmi* 7 C W N 688 *Dungannon v Smith* 12 Cl. & F 546 624, *Re Ashforth* (1905) 1 Ch 535

(j) *Leake v Robinson* 2 Mer 363 392 *Bentnck v Duke of Portland* 7 Ch D 693

(k) *Ring v Hardwick* 2 Beav 352

(l) *Whitby v Mitchell* 42 Ch D 494 on app 44 Ch. D 85

(m) *Gooder v Edmunds* (1893) 3 Ch 455 *Re Dacron* (1893) 3 Ch 421

shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the testator or any other person taking any interest under the will, or

(ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interests under the will, or

(iii) the preservation or maintenance of any property bequeathed,

and such direction may be made accordingly.

1. Change The above section was substituted by the Transfer of Property Amendment Supplementary Act (XXI of 1929) in place of the following section in the Succession Act of 1925 (XXXIX of 1925) —

117. A direction to accumulate the income arising from any property shall be void and the property shall be disposed of as if no accumulation had been directed.

Effect of direction for accumulation

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death, and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed

Illustrations

(i) The will directs that the sum of 10,000 rupees shall be invested in Government securities, and the income accumulated for 20 years and that the principal, together with the accumulations, shall then be divided between A, B and C. A, B and C are entitled to receive the sum of 10,000 rupees at the end of a year from the testator's death

(ii) The will directs that 10,000 rupees shall be invested, and the income accumulated until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year from the testator's death

(iii) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulation shall be then paid to the eldest son of A. At the death of the testator A has an eldest son living, named B. B will receive, at the end of one year from the testator's death, the rents which have accrued during the year, together with any interest which may have been made by investing them

(iv) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulation shall then be paid to the oldest son of A. At the death of the testator, A has no son. The bequest is void.

(v) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B, and so much of the interest as is not required for his maintenance and education is accumulated not by reason of the direction contained in the will, but in consequence of B's minority.

Similar change has been made in the corresponding section of the Transfer of Property Act.

2. The section. The section does not apply to the wills of Hindus, etc. Of S 17 Transfer of Property Act. It will be seen that the amendment has the effect of radically altering the law. The old rule allowed accumulation for one year only (1) in case of income of immovable property and also (2) in case of any other property where the accumulation was directed to be made from the testator's death. In all other cases a direction to accumulate was void and the rule admitted of no exception. It should be remembered, however, that an executor might defer the payment of a legacy for one year.

The Indian law as it stood prior to the amendment was very much more stringent than the English rule of common law which permitted the income of land or goods to remain invested for the same period as the corpus. Owing to the abuse of the right to accumulate the income of settled property by a Mr. Thellusson who directed to tie up the property and the income thereof for the benefit of his remote descendants an Act to limit the power was passed which is commonly called the Thellusson Act (39 & 40 Geo III c 98). This Act forbade the accumulation of income for a longer term than (1) the life of the grantor or settlor, (2) 21 years from the death of the grantor or settlor or testator, (3) during the minority or respective minorities of any person or persons living or in the mother's womb at the death of the grantor settlor or testator, or (4) during the minority or respective minorities only of any person or persons who would under the instrument, if of full age be entitled to the income directed to be accumulated. These periods were alternative and not cumulative (a). The Act further did not apply to accumulations directed for (1) payment of debts of the settlor or testator or other person, (2) raising portions for any child of the settlor or of any other person taking an interest under the settlement or (3) to any direction touching the produce of timber upon any land.

The English Act, it will be seen not only allowed a much longer period than the old provision in the Succession Act but in certain cases the restrictions against accumulation were not applicable at all. By the Accumulation Act 1892 (55 & 56 Vict c 58) and by the Property Act, (12 & 13 Geo V c 16) some more exceptions were added to the list mentioned in the Thellusson Act. The whole law is now consolidated by the Law of Property Act 1925 (15 Geo V c 20 Ss 164-166).

The need for amending the Indian law was felt long ago. Thus in their report the Second Indian Law Commission remarked — 'As to the rule prohibiting

(a) *Jagger v Jagger*, 25 Ch D 729

accumulation, we all should prefer the more liberal enactments of the Thellusson Act (39 & 40 Geo. III c. 98) which allow an accumulation for 21 years and do not affect provisions for payment of debts or for raising portions. But as the rule embodied in the Succession Act, (of 1865 s. 104), has now been in force for 14 years Mr. Stokes and Mr. West do not press for its alteration." Sir Charles Turner, however, was of opinion that the amendments were desirable in the interests of large zemindary properties.

2. Application of the rule to wills of Hindus, etc. This section has not been made applicable to Hindu wills, though a corresponding section is contained in the Transfer of Property Act. It is not surprising, therefore, to find that in cases of Hindu wills, which were not governed by s. 104 of the Succession Act of 1865, the rule followed was that if there was nothing *per se* illegal in a direction to accumulate, and if such direction was neither so unreasonable in its conditions as to be against public policy nor given for the purpose of carrying out an illegal object, the direction should be given effect to (a). What then is the period during which an accumulation can be directed by a Hindu? The law has been clearly laid down in *Watkins v. Adm. Genl.* (b), where it is thus stated: "On principle, I think, it must be for so long a time as the absolute vesting of the entire interest can be withheld or for so long a time as that during which the corpus of the property can be rendered inalienable, or its course or its devolution can be directed and controlled by a testator." A direction to create a trust and to accumulate the income for 99 years was "treated as a condition repugnant to the natural right of every owner of property to the use and enjoyment of it, inconsistent with the nature of the property itself, and therefore void (c). A direction to accumulate the corpus after making some monthly payments till it reached the sum of 3 lacs when the corpus was to be divided has been held to be void (d). A direction to keep the corpus intact is void as an attempt to create perpetuity and to limit for an indefinite period the enjoyment of its profit (e). An attempt to defer the period of payment to or enjoyment by a beneficiary of a vested interest is inoperative (f). A direction in a will to trustees to pay to a legatee so much of certain dividends as she might from time to time require for her own use and to accumulate the surplus not required by her upon certain trusts specified entitles the legatee to receive from the trustees money up to the full amount of interest but she can not claim

- (a) *Rajendra v. Raj Coomari*, 34 C. 5, *Soorjeemoney v. Deenobunda*, 6 M. I. A., 526, 536, *Sonafun v. Juggul*, 8 M. I. A. 65, *Bhasonauth v. Bama Soondery*, 12 M. I. A. 41, 61, *Amrilo Lal v. Sumomoye*, 24 C. 589, 608, 25 C. 662, 691, 27 C. 996, P. C., *Ram Lal v. Bijhumukhi*, 47 C. 76, *Watkins v. Adm. Genl.*, 47 C. 48 (see cases cited).
- (b) 47 C. 48, 93, see also *Amrilo Lal v. Sumomoye*, 24 C. 589, 615, 25 C. 662, *Rajendra v. Raj Coomari*, 34 C. 510.
- (c) *Kumara Ailma v. Kumara*, 2 B. L.

- R. O. C. 11, 29, but a direction to accumulate for 10 years *Nasir v. Rajan*, 15 C. W. N. 66 or for 16 years, *Jamnabai v. Dhaney*, 4 Bom. L. R. 893, has been held to be valid.
- (d) *Krishnamanni Ananda*, 4 B. L. R. O. C. 231, 277.
- (e) *Soakhmoy v. Monohurt*, 12 I. A. 103, 11 C. 684.
- (f) *Bramamayl v. Jages*, 8 B. L. R. 400, see also *Calv. Nath v. Chunder Nath*, 8 C. 378; *Maknonda v. Ganes*, 1 C. 104, *Soakhmoy Monohurt*, 12 I. A. 103, 11 C. 684.

afterwards what she did not receive (a) and such a direction does not prevent vesting of the legacy in interest (b) Where the direction to accumulate exceeds the period allowed by the rule against perpetuity, or the ulterior gift is to an unborn person, it is void altogether The estate will go to the heir The interposition of a trust makes no difference (c) A person solely entitled to a fund directed to be accumulated can release the direction for accumulation and enjoy the whole income (d).

4. Direction to accumulate, how constituted. No particular words are necessary to constitute a direction to accumulate The word 'accumulate' need not be used nor is an express direction necessary (e) The direction may be implied (f) "A direction to 'invest' or 'capitalise' income" (g), or to form a reserve or guarantee fund, or the like, may be sufficient (h) The court is to look to the substance of the words instead of to the language used by the testator. Thus where a testator gave the residue of his estate in trust for conversion, with power to postpone conversion for 21 years and with a direction to accumulate the income during that period, and the residuary estate was settled on trust for tenants for life and remaindermen *held*, there was a valid direction to accumulate (i) "In *re* Crosswell (j) It was held that a codicil should not be read into a will so as to extend the period of accumulation and make it void"

5 Sub section (1) It extends the period of accumulation to 18 years in place of one year allowed by the old section It also states that a direction to accumulate for a period exceeding 18 years is good up to 18 years but void for the subsequent period Thus a trust for accumulation has been held void only for the subsequent period (k) Where the period is not specified but a direction is given to accumulate the income in order to raise a specified sum for the benefit of a person in existence, in such a case the direction will be valid only to the extent allowed by law (l) 'If, however, the persons to benefit by any trust or accumulation are not necessarily ascertainable within the period allowed by the Rule against Perpetuities, the trust is void ab initio' (m)

6. The period, how to be calculated The period of 18 years is to be calculated immediately from the death of the testator, excluding however, the

(a) *Krishnarao v. Bennahat* 21 B 571, 595, see *Seetangathanni v. Valithinga*, 63 I. C 104, 40 M L J 532

(b) *Ganapathy Pillay v. Alameloo*, 123 I C 729

(c) *Kumara Asima v. Kumara* 2 B L R O C 11, *Krishnarasmani v. Ananda*, 4 B L R O C 231, *Bramamay v. Jagesh*, 8 B L R 400, *Sookhmoy v. Monohurri*, 11 C. 684 (where an account was directed to be taken of the profits and proceeds of the estate from the date of the testator's death *Soorjee-money v. Denobando*, 9 M I A 123 *fold*)

(d) *Benode v. Nistarini*, 33 C. 180, 192, P. C.

(e) *Morgan v. Morgan* 4 D G & S 164; *Tench v. Cheete*, 6 D M &

G 453

(f) *Watson's Trustees v. Brown*, 1923 S. C 228 J 354 7 Ed

(g) *Mathews v. Keble* 3 Ch 691, *Re Mason*, (1891) 3 Ch 467

(h) *Re Cox*, 1900 W N 89 J 354

(i) *Wentworth v. Wentworth*, 1900 A C 163

(j) 58 Sol Jo 360 J 355 7 Ed

(k) *Longdon v. Simpson* 12 Ves. 295, *Morgan v. Morgan* 20 L J Ch 109, *Show v. Rhodes* 1 My & Cr 135, *Talbot v. Jevors* 20 Eq 255

(l) *Oddie v. Brown*, 4 D G & J 179 *Williams v. Lewis* 6 H. L. C. 1013 J 356 7 Ed

(m) J 356 7 Ed. *Carls v. Lukin* 5 Beav 147, *Scarsbrick v. Skelmersdale* 17 Sim 187.

day of death (a), even though the accumulation has been directed to commence some time after the testator's death (b)

7 Minority accumulation. The Real Property Act (15 Geo V. c 20, s 165) states that where accumulations of surplus income are made during a minority under any statutory power or under the general law, this period of minority is not to be taken into account in determining the period for which accumulations are permitted to be made, "accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority" (c) The law is clearly laid down in *re Maber* (d) where it is stated that the years of minority accumulation are not to be reckoned in the period allowed by the rule against accumulation Illustration (v) of the old section, no doubt, showed that direction to accumulate during minority was good (e), but there is no reference to minority accumulation in the present section

8 Income thereof shall be disposed of. Where there is an absolute gift or a present gift in possession and there is coupled with it a direction for accumulation, the direction is bad and the donee is entitled to the immediate income as if there was no such direction (f) 'Where the vesting of a contingent interest (g), or the possession of a vested interest (h), is postponed till the expiration of the period of accumulation, the statute by stopping the accumulation, does not accelerate the vesting in one case or the possession in other (i), and the released income devolves as if the testator had made no disposition of it (j) Where the residue is directed to be accumulated, and the accumulation is stopped, it will go to the heir (k). This is the rule to be followed in this country as will appear from the concluding words of sub sec (1) The income of the accumulations follows the same rule, therefore, if the accumulations arise from property which does not form part of the residue, the income falls into the residue (l) and in case of income from residue it goes to the heir (m)

9. Sub-section (2): Exception (i). A direction to accumulate for the payment of debts is valid even if the rule against perpetuity be infringed (n), or

- (a) *Gorst v. Lownds*, 11 Sim 434, *Lester v. Garland*, 15 Ves 248
 (b) *Show v. Rhodes*, 1 My & Cr 135, *All Genl. v. Poulsten* 3 Hare 555, *Nettleton v. Stephenson*, 3 D G & S 336 J 356 7 Ed
 (c) *Griffiths v. Vere*, 9 Ves 127, 136, *Althams v. Keble*, 3 Ch 691, 696
 (d) (1928) Ch 88
 (e) If the direction to accumulate be beyond the period of minority then if the legacy be vested absolutely, the direction will be void beyond that period *Re Young's Settlement*, 18 Beav 199, *Holloway v. Webber* 6 Eq 523, *Harbin v. Ascherman*, (1894) 2 Ch 184 W 921 12 Ed
 (f) *Mokoondo v. Gonesh*, 1 C. 104, *Cally Nath v. Chunder Nath*, 8 C

- 378, *Coombe v. Hughes* 34 Beav 127
 (g) *Jones v. Aggys*, 9 Hare 605
 (h) *Barrington v. Liddell* 10 Hare 429, *Talbot v. Jevors* 20 Eq 255
 (i) *Green v. Gascoyne* 4 D J. & S 565
 (j) J 364 5 Ed
 (k) *Skrymsher v. Northcote*, 1 Sw. 566, *Pride v. Fooks* 2 Beav 430, *Re Travis* (1900) 2 Ch 541 J 365, 7 Ed
 (l) *Re Hamblins*, (1916) 2 Ch 570, *Re Garnde*, (1919) 1 Ch 132 J 365 7 Ed
 (m) *Gyre v. Manden*, 2 Keen 564, *Re Perkins* 101 L T 345
 (n) *Tesart v. Lawton* 18 Eq 490; *Bateman v. Hatchkin*, 10 Beav, 425, *Briggs v. Earl of Oxford*, 1 D M & G 363 J 295, 343

even if the testator has left indefinite the duration of accumulation (a). As to the meaning of incumbrances see *re Llanoter* (b). The provision must be a *bonafide* one and not a colourable one intended to benefit a particular legatee (c). The debts may be debts existing at the testator's death or debts or liabilities to arise thereafter but within the period allowed by the rule against perpetuities (d). Where the creditors have been paid, whether out of the *corpus* directed to be accumulated or otherwise, the direction to accumulate can not be prolonged beyond the statutory period for the benefit of persons entitled to the fund (e). The debt must be a debt of the testator or that of a beneficiary under the will.

10. Exception (ii) The provision of portions. A portion means a part or share. "Now the meaning of the word 'portion', as generally understood, is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion because it is given to all the children, including the eldest child, and not to the younger children only. The question to be answered is whether the benefit to be taken by the children or some of them comes from their parents, or out of property in which their parents take an interest" (f). The same case lays down that a direction for accumulation is protected if it is a provision for raising portions for children of any person taking an interest under the will (g).

A direction to accumulate the entire estate for the benefit of the children cannot be said to be a direction for raising portions for them. "If every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulation being most frequently for the benefit of children, would be entirely defeated" (h). In *Beech v Lord St Vincent* (i) a testator devised estates to A for life with remainder to his first and other sons in tail, with remainders over, and directed £2000 per annum to be accumulated for 21 years during the life of A and so much longer as A had any younger children, the accumulations were to be held on trust for such younger children held, that the term 'portion' was correctly applicable to a gift of this description, viz., an annuity of £ 2000 per annum to be deducted from the income during 21 years or longer to be laid out and accumulated and the accumulated fund to go to the younger children. The term portion, it was declared, might well extend to a fund appropriated for the purpose of raising future portions and was not necessarily confined to a charge or debt already existing upon the estate which was to be paid off by the accumulation. Children would include children thereafter to come into existence. 'The provision for 'raising portions' points to the creation of a subsidiary fund out of and less than a larger one composed of an original fund and the

- (a) *Lord Southampton v Marquis of Hertford*, 2 V & B 54 65, *Baleman v Hotchkiss* 10 Beav 426,
(b) (1907) 1 Ch 635
(c) *Mathews v Keble* 3 Ch 691
(d) *Varlo v Farden*, 27 Beav 255, *Re Hurlblatt*, (1910) 2 Ch 553, *Re Mason*, (1891) 3 Ch 467 J 358 7 Ed
(e) *Tewari v Lawson* 18 Eq 490, *Re Heathcote*, (1904) 1 Ch. 826

- J 359 7 Ed
(f) *Re Stephens* (1924) 1 Ch 322, *Andrews v Partington*, 3 Bro C. C. 402 discussed
(g) *Re Elliott* (1918) 2 Ch 150
(h) *Edwards v Tuck*, 3 D M & G 40, 58; *Wildes v Daes* 1 Sm & G 475, *Mathews v Keble*, 3 Ch 691, *Re Elliott*, (1918) 2 Ch. 150
(i) 3 D G & S 678

day of death (a), even though the accumulation has been directed to commence some time after the testator's death (b)

7 **Minority accumulation.** The Real Property Act (15 Geo V. c 20, s 165) states that where accumulations of surplus income are made during a minority under any statutory power or under the general law, this period of minority is not to be taken into account in determining the period for which accumulations are permitted to be made, "accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority" (c) The law is clearly laid down in *re Maber* (d) where it is stated that the years of minority accumulation are not to be reckoned in the period allowed by the rule against accumulation. Illustration (v) of the old section, no doubt, showed that direction to accumulate during minority was good (e) but there is no reference to minority accumulation in the present section

8 **Income thereof shall be disposed of.** Where there is an absolute gift or a present gift in possession and there is coupled with it a direction for accumulation, the direction is bad and the donee is entitled to the immediate income as if there was no such direction (f) 'Where the vesting of a contingent interest (g), or the possession of a vested interest (h), is postponed till the expiration of the period of accumulation, the statute, by stopping the accumulation, does not accelerate the vesting in one case or the possession in other (i), and the released income devolves as if the testator had made no disposition of it' (j) Where the residue is directed to be accumulated, and the accumulation is stopped, it will go to the heir (k). This is the rule to be followed in this country as will appear from the concluding words of sub sec (1) The income of the accumulations follows the same rule, therefore, if the accumulations arise from property which does not form part of the residue, the income falls into the residue (l) and in case of income from residue it goes to the heir (m).

9. **Sub-section (2): Exception (i).** A direction to accumulate for the payment of debts is valid even if the rule against perpetuity be infringed (n), or

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| <p>(a) <i>Gost v Lowndes</i>, 11 Sim 434.
 <i>Leslie v Garland</i>, 15 Ves 248</p> <p>(b) <i>Shaw v Rhodes</i>, 1 My & Cr 135.
 <i>Att Genl. v Poulton</i> 3 Ha 555.
 <i>Nettleton v Stephenson</i>, 3 D G & S 336 J 356 7 Ed</p> <p>(c) <i>Gri피스 v Vere</i>, 9 Ves. 127, 136.
 <i>Mathews v Keble</i>, 3 Ch 691, 695</p> <p>(d) (1928) Ch 68</p> <p>(e) If the direction to accumulate be beyond the period of minority then if the legacy be vested absolutely the direction will be void beyond that period <i>Re Young's Settlement</i>, 18 Beav 199.
 <i>H'loway v Walker</i> 6 Eq 523.
 <i>Hartin v Westerman</i> (1824) 2 Ch. 184 W. 921 12 Ed.</p> <p>(f) <i>Malpounds v Gonsal</i>, 1 C. 104.
 <i>Cal j. Nath v Chandler Nath</i> 8 C.</p> | <p>378, <i>Coombe v Hughes</i> 34 Beav 127</p> <p>(g) <i>Jones v Mags</i>, 9 Ha 605</p> <p>(h) <i>Barrington v Liddell</i>, 10 Ha 429.
 <i>Tillot v Jecem</i> 20 Eq 255</p> <p>(i) <i>Green v Gascoyne</i>, 4 D J. & S 565</p> <p>(j) J 364 5 Ed</p> <p>(k) <i>Shymmer v Northcote</i>, 1 Sw 566.
 <i>Pride v Fooks</i> 2 Beav 433. <i>Re Tracts</i> (1900) 2 Ch. 541 J 363, 7 Ed</p> <p>(l) <i>Re Hawkins</i>, (1916) 2 Ch. 570.
 <i>Re Gamble</i> (1919) 1 Ch. 132 J 365 7 Ed.</p> <p>(m) <i>Eyre v Standen</i>, 2 Keen 564. <i>Re Perkins</i> 101 L. T 345</p> <p>(n) <i>Tesart v Lanyon</i>, 18 Eq 470.
 <i>Bateman v Hotchkin</i>, 10 Beav. 425; <i>Briggs v East of Oxford</i>, 1 D M & G 363 J 229, 343</p> |
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even if the testator has left property to the trustee of a settlement. As to the meaning of accumulation see *Re Jones* (1891). The provision must be a fund of one kind or kind of property and not a collection of property of different kinds. The debts may be debts existing at the testator's death or debts created thereafter but within the period allowed by the will against perpetuities. Where the debts have been paid whether out of the corpus directed to be accumulated or otherwise, the direction to accumulate can still be put into effect beyond the statutory period for the benefit of persons entitled to the fund. The debt must be a debt of the testator or that of a beneficiary under the will.

10. Exception (ii) The provision of portions. A portion means a part of an inheritance. Now the meaning of the word 'portion' as generally understood, is a sum of money or land or both of property either coming from or settled upon its parents. The benefit is to the children as a gift because it is given to all the children including the eldest and eldest to the youngest only. The question to be answered is whether the benefit to be taken by the children or some of them comes from the parents' estate of property in which their parents take an interest? (i) The same case lays down that a direction for accumulation is protected if it is a provision for raising portions for children of any person taking an interest under the will.

A direction to accumulate the entire estate for the benefit of the children cannot be said to be a direction for raising portions for them. "If every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulation, such a accumulation being most frequently for the benefit of children would be thereby defeated." (ii) In *Re Aylmer* (1891) a testator devised estates to A for life with remainder to his first and other sons in tail, with remainders over and directed £100 per annum to be accumulated for 21 years during the life of A and so much longer as A had any younger children. The accumulations were to be held on trust for such younger children and that the term 'portion' was correctly applicable to a gift of this description, viz., an annuity of £2000 per annum to be deducted from the income during 21 years or longer to be laid out and accumulated and the accumulated fund to go to the younger children. The term 'portion', it was declared, might well extend to a fund appropriated for the purpose of raising future portions and was not necessarily confined to a charge or debt already existing upon the estate which was to be paid off by the accumulation. Children would include children thereafter to come into existence. "The provision for raising portions points to the creation of a subsidiary fund out of and less than a larger one composed of an original fund and the

- (a) *Lord Southampton v. Margate* of *Hertford* 2 V & B 54 65, *Bateman v. Hatchkin* 10 Beav 426
(b) (1907) 1 Ch 635
(c) *Mathews v. Keble*, 3 Ch 691
(d) *Varlo v. Farden* 27 Beav 255, *Re Hurlbott* (1910) 2 Ch 553, *Re Mason*, (1891) 3 Ch 467 J 358 7 Ed.
(e) *Tewari v. Lawson* 18 Eq 490, *Re Heathcote* (1904) 1 Ch 826

- J 359 7 Ed
(f) *Re Stephens* (1914) 1 Ch 322, *Andrews v. Partington* 3 Bro C C. 492 discussed
(g) *Re Elliott* (1918) 2 Ch 150
(h) *Edwards v. Tuck* 3 D M & G 40 58, *Wildes v. Davies* 1 Sm & G 475, *Mathews v. Keble* 3 Ch 691, *Re Elliott* (1918) 2 Ch. 150
(i) 3 D G & S 678

day of death (a), even though the accumulation has been directed to commence some time after the testator's death (b)

7 Minority accumulation. The Real Property Act (15 Geo V c 20, s 165) states that where accumulations of surplus income are made during a minority under any statutory power or under the general law, this period of minority is not to be taken into account in determining the period for which accumulations are permitted to be made, 'accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority' (c) The law is clearly laid down in *re Maher* (d) where it is stated that the years of minority accumulation are not to be reckoned in the period allowed by the rule against accumulation. Illustration (v) of the old section, no doubt, showed that direction to accumulate during minority was good (e) but there is no reference to minority accumulation in the present section

8 Income thereof shall be disposed of. Where there is an absolute gift or a present gift in possession and there is coupled with it a direction for accumulation, the direction is bad and the donee is entitled to the immediate income as if there was no such direction (f) 'Where the vesting of a contingent interest (g), or the possession of a vested interest (h), is postponed till the expiration of the period of accumulation, the statute by stopping the accumulation, does not accelerate the vesting in one case or the possession in other (i), and the released income devolves as if the testator had made no disposition of it' (j) Where the residue is directed to be accumulated, and the accumulation is stopped, it will go to the heir (k) This is the rule to be followed in this country as will appear from the concluding words of sub sec (1) The income of the accumulations follows the same rule, therefore, if the accumulations arise from property which does not form part of the residue, the income falls into the residue (l) and in case of income from residue it goes to the heir (m)

9 Sub-section (2): Exception (1). A direction to accumulate for the payment of debts is valid even if the rule against perpetuity be infringed (n) or

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| (a) <i>Gorst v Lownds</i> , 11 Sim 434,
<i>Lester v Garland</i> , 15 Ves 248 | (g) <i>Jones v Aggs</i> , 9 Hare 605 |
| (b) <i>Shaw v Rhodes</i> , 1 My & Cr
135, <i>All Genl v Poulsten</i> , 3
Hare 555, <i>Nettleton v Stephenson</i>
3 D G & S 336, J 356 7 Ed | (h) <i>Barrington v Liddell</i> , 10 Hare 429
<i>Talbot v Jerns</i> , 20 Eq 255 |
| (c) <i>Griffiths v Vere</i> , 9 Ves 127, 135
<i>Mathews v Keble</i> , 3 Ch 691
696 | (i) <i>Green v Gascoyne</i> , 4 D J & S
565 |
| (d) (1928) Ch 88 | (j) J 364 5 Ed |
| (e) If the direction to accumulate be
beyond the period of minority then
if the legacy be vested absolutely
the direction will be void beyond
that period <i>Re Young's Settlement</i>
18 Beav 199, <i>Hill v Howes v Webster</i>
6 Eq 523, <i>Hardin v Masterman</i>
(1874) 2 Ch 184 W 921 12
Ed. | (k) <i>Skraymer v Northcote</i> , 1 Sw 566
<i>Pride v Fooks</i> , 2 Beav 430, <i>Re</i>
<i>Travis</i> (1900) 2 Ch 541 J 365,
7 Ed |
| (f) <i>Makonda v Gorosh</i> , 1 C. 104,
<i>Cally Nath v Chunder Nath</i> 8 C | (l) <i>Re Hawkins</i> (1916) 2 Ch 570,
<i>Re Garlile</i> (1919) 1 Ch 132 J
365 7 Ed |
| | (m) <i>Cyre v Manden</i> , 2 Keen 564, <i>Re</i>
<i>Perkins</i> 101 L. T 345 |
| | (n) <i>Tewart v Lawson</i> , 18 Eq 470,
<i>Baleman v Hotchkin</i> , 10 Beav.
426, <i>Bliggs v Earl of Oxford</i> , 1
D M & G 363 J 285, 343 |

accumulated interest thereon' (a) The destination of a fund may help to determine the question as to whether a gift is a gift by way of portion or not. Thus, if it be confined to the children of a legatee it will be a portion, but if the legatee be granted a testamentary power of appointment in respect of the fund it will not be a portion (b). The interest of the father need not be one in the very fund to be accumulated. An interest, however minute, will be sufficient (c).

If a direction be not a provision for raising portions but be a provision for making additions to the capital for the purpose of making one gift of an aggregate fund, e.g., the whole of the residue, the section has no application, nor has it any application where the direction to accumulate is in favour of a legatee who is not the child of a person taking a benefit under the will (d).

Mr Jarman observes that the exception respecting accumulation for the purpose of portions for any child or children has given rise to great difficulty.

11. Accumulation for charitable purposes. A provision for accumulation which will enure for the benefit of charitable purposes cannot be said to offend against the law prohibiting perpetuities (e).

118 (S. 105) No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

Illustrations.

A having a nephew makes a bequest by a will not executed and deposited as required—

- for the relief of poor people,
 - for the maintenance of sick soldiers
 - for the erection or support of a hospital,
 - for the education and preferment of orphans,
 - for the support of scholars,
 - for the erection or support of a school,
 - for the building and repairs of a bridge,
 - for the making of roads;
 - for the erection or support of a church,
 - for the repairs of a church,
 - for the benefit of ministers of religion,
 - for the formation or support of a public garden.
- All these bequests are void.

- (a) *Re Elliott*, (1918) 2 Ch 150 154
- (b) *Re Clulow's Trusts*, 1 J & H 639
- (c) *Barrington v Liddell*, 2 D M & G, 45
- (d) *Lyre v Manden*, 2 Kees 364

- (e) *Muthukana v S'ada Leral*, 34 M 12, see *Marlin v Masterman*, 11894) 2 Ch 184; *Chamberlayne v Brockett*, 8 Ch 205

The section. The section does not apply to the wills of Hindus, (a) *etc.* In order to prevent deathbed or other dispositions of immovable property in favour of charity, to the disinherison of lawful heirs, Statutes of Mortmain were passed in England from time to time. The Statute of 1736 for example, required a deed attested by two witnesses and executed 12 months before the death of the donor and enrolled within 6 months after execution. Similar provisions were contained in the Statute of 1888 (51 & 52 Vict c 42). The Succession Act, when it was passed, was therefore more liberal, in as much as it allowed gifts by will to be made subject to the restrictions, *viz.*, that the will must be executed not less than 12 months before the death of testator and deposited within the 6 months of its execution in some place, as mentioned in the section when there were nearer relations than nephews and nieces. It was by Statute 54 & 55 Vict c 73 that land was permitted in England to be given to a charity by will, but the charity could not keep the land unless it was wanted for actual occupation. The need of attestation and enrolment has been dispensed with by the Law of Property Act, 1925 (16 & 17 Geo V. c 11)

Cases In *Adm Genl v Money* (b) a gift to a charity was held void, because it was executed less than 12 months before the testator's death and the testator had nearer relations than nephews and nieces. Where there are no nearer relations than nephews and nieces the will need not be executed 12 months before death nor need be deposited as set out in section. The term relative refers to kindred only as set forth in the table of consanguinity and has no application to relationship by marriage. Therefore, where a testator leaves a widow surviving and no nearer relation than a nephew or niece the formalities laid down in the section need not be complied with (c). Further the relationship contemplated by the section is one which the law recognises. Thus where A and B were not born out of lawful wedlock, an issue of B will not be a nephew or niece of A (d). A registration and deposit of wills is required under the Oudh Estates Act for effect of non compliance with the law, see *Abdul v Amir* (e)

CHAPTER VIII.

OF THE VESTING OF LEGACIES

119 (S 106) Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest

Date of vesting of legacy when payment or possession postponed

(a) But see the Oudh Estates Act (I of 1869)
(b) 15 M 448 See *Elizabeth Vanquelin v Official Trustee* 52 C L J 475

(c) *Adm. Genl v Simpson* 26 M 532
(d) *Emma Smith v Massey*, 30 B 500, 8 Bom L R 322
(e) 10 C 976 P C

9 Prior interest is created When an interest is created by will which follows a prior interest created under the same instrument the latter is known as remainder (see illust iii) Lord Coke defines it as a remnant of an estate in lands or tenements expectant upon a particular estate created together with the same at one time' (a) It is thus a future estate which takes effect in possession on the natural determination of the prior estate. A vested remainder is one the owner of which is living and ascertained and which is an estate in property complete in interest though deferred in enjoyment until the determination of a prior estate but necessarily capable of taking effect as soon as the preceding estate comes to an end. It is thus ready to come into possession from the time of its creation immediately the prior estate comes to an end. It is to be distinguished from a contingent remainder and the test to be applied for the purpose has been thus laid down by Fearn (b) It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail is and must be liable as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession if the possession were to become vacant and not the certainty that the possession will become vacant before the estate limited in remainder determines that universally distinguishes a vested remainder from one that is contingent. Therefore when ever the preceding estate is limited so as to determine on an event which certainly must happen and the remainder is so limited to a person in esse and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder such remainder is vested (c)

A prior interest therefore has not necessarily the effect of postponing the vesting of the interest in the remainderman (d). Thus a gift of all his property after the death of the testator and of his wife to his nephew conferred a vested interest on the nephew which was transmitted to his heirs even though he died before the testator's wife (but after the testator) (e). It is not material how the testator expresses himself or in what order the clauses of the will are arranged. A gift to A of 3 p c consols at the testator's wife's death was a gift of a vested interest in the nature of a remainder and therefore was not affected by his death before the testator's widow (f). Testators in this country very often express themselves to the following effect. After my death my wife A will be the owner of my property. She may have power to do what she likes. After her death my daughter B will be the owner of that property. It has been held in such cases that the widow takes a life estate and the daughter a vested remainder (g).

- (a) Co. Litt 143 a
 (b) Contingent Remainder 216 217
 (c) See *Ernest v Adams* 48 M. L. J. 707
 (d) *Smith v Palmer* 7 Hare 225
Ernest v Gray 43 M. L. J. 707
 713 A. Subramaniam v T. Subramaniam 4 M. L. J. 124 Colgan v Adm. Genl 15 M. L. J. 424 Mathura v Morrochini 57 I. C. 747
 (e) *Blaso v Munnial* 33 A. 558 (olaz)
Bhagatall v Kali Charan 39 C. 458 P. C.
 (f) *Blamie v Gelds* 16 Ves 314
Parkinson v Gregory 4 Hare 376

- Re Bright's Trusts* 21 Beav 67
Lucas Tooth v Lucas Toth 1921
 A. C. 594 *Hallifax v Wilson*
 16 Ves 169 J. 1378 7 Ed.
 (g) *Lallu v Jagmohan* 22 B. 409;
Chant Lal v Bal Mull 24 B.
 420 *Ram Lal v S. of S. for India* 8 I. A. 46 7 C. 304
Gooroodas v Saal 29 C. 677 6
 C. W. N. 721; *see Jalom v Kucerat* 9 B. 491, *Ad. Genl v Bithaldas* 22 Bom. L. R. 1005
per con in Srinasa v Dandayajapani
 12 M. 411

If the terms of a bequest be construed to confer a vested interest in the legatee, 'clear words are required to convert it into a contingent one' (a) A person entitled to a legacy on the death of a life tenant can sue the life tenant for a declaration that he is entitled as next reversioner and for injunction restraining the life tenant from wasting the property in suit (b)

Where a testator directed that his two wives might reside in his half share in a house and in the event of their death his brother's son V, or his unborn brother or brothers, should subsequently be the owner of the half share, *held*, the widows got a right of residence under the will and V a vested estate in perpetuity in the house (c) The words *then* or *subsequently*, as was observed in *Benyon v Maddison* (d), do not postpone vesting In case of a gift after prior interests to persons then living the word *then* refers most naturally to the last antecedent and confers a vested interest on the legatee (e) Where a testator gave £830 to trustees to pay the interest to his wife for life and after her death in parts and shares to other legatees, these were held to have vested interests in the legacies (f)

It has been pointed that in applying this principle to gifts under wills of Hindus, care should be taken to ascertain whether the prior gift is that of a life estate or of some limited estate peculiar to Hindu law If the prior estate be not a life estate but, for instance, a Hindu woman's estate, then no vested remainder will arise (g)

In case of a vested remainder following a prior interest, if the latter fails, there will be acceleration of the former (h)

If any condition be superadded other than the determination of the prior interest, then the rule does not apply (i) The rule which makes a legacy vested when the gift and time of payment are distinct applies to those cases only where the time, at which the legacy is payable, depends for its happening on an event which the law for this purpose considers to be certain and fixed as for example the legatee attaining a certain age but if it depends on any other event such as his marriage, the event is considered to be contingent, and the contingency is then held to be attached to the substance of the gift, and the gift will, therefore, fail if the contingency do not happen (j)

10 Illustration IV Illust (iv) is based on the rule stated in *Phipps v Aclers* (k), viz., that an estate given to a devisee on attaining the age of majority is in fact only a remainder taking effect in its natural order, on the determination of the preceding estates and that the attaining of the prescribed age in such a case

- (a) *Re Duke*, 16 Ch D 112, see also *Re Smith's Trusts*, 1 Eq 79, *Blight v Hartnoll* 13 Ch D 858
 (b) *Manmatha v Rohilli Mont* 27 A 406
 (c) *Jatram v Kuerbal* 9 B 491, 507, see also *Lallu v Jagmohan* 22 B 409, *Chunilal v Bal Muli*, 24 B 420, *Gooroodas v Saraf*, 29 C 699 6 C. W. N 721
 (d) 2 Bro C. C. 73.
 (e) *Kaikhushru v. Shrinibai*, 23 C W. N. 419 P. C.

- (f) *Partridge v Baylis* 17 Ch D 835
 (g) *Srinicasa v Dandayudapani*, 12 M 411
 (h) *Jull v Jacobs* 3 Ch D 703
 (i) *Maddison v Chapman* 4 K & J. 709 719 and 3 D G & J 536 *Edgeworth v Edgeworth*, L. R. 4 H L 35, 40, *Re Shuckburg's Settlement*, (1901) 2 Ch 794
 (j) *Atkins v Huscocks* 1 Atk. 500; *Ellon v Ellon*, 3 Atk 504 *Fearce*, Butler's note 552.
 (k) 9 Cl & F 583 591

no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the prior particular estates (a). The estate in both the legatees vests at the same time (b). But where only the interest and not the principal is given to A and the principal is given to B on attaining a certain age, and there is no indication in the will of a gift of the principal to B till the attainment of that age, then the interest of B will be contingent (c). When the gift over is in complete defeasance of a prior interest, e.g., in case of substitutional gifts or gifts to survivors, the prior interest takes effect but is liable to be determined on the happening of the event, e.g., in illustration (iv) on B attaining the age of 18 but on failure of the gift over before such determination, e.g., on B dying below the age of 18, the prior gift becomes absolute (d).

11. **Remainders in favour of children** Where there is a gift to children after a prior interest in favour of another person, the presumption is that a vested interest was intended to be given to the children (e). The rule applies to gifts to grandchildren if the testator stands as *loco parentis* in respect of them, not otherwise (f). The rule will not apply where the issue of the children have been provided for in the will (g). The rule is confined to cases where the will is ambiguously expressed or contains contradictory clauses but not where the testator has clearly expressed an intention to the contrary (h).

12. (iii). **Direction for accumulation of income.** A gift in terms which import a present vested interest with a postponed time of payment is not made contingent by a direction to accumulate till the time of payment arrives (i). Where, therefore, there is an absolute gift made payable at a future time, or on the happening of a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no person has any interest but the legatee. He may accordingly put an end to an accumulation which is exclusively for his benefit (j). See note, next section.

13. (iv) **Gift over** The general rule has been thus stated (k). The general rule appears to be that a limitation over on a contingency does not, of itself, and without more, prevent any of the shares of the legatees from vesting in the meantime, provided the words of the bequest are, in other respects sufficient to pass a present interest, though such a limitation over of the entirety may be called in a aid of other circumstances to show that no present interest was intended to pass. Thus where a testator gave his personal estate to trustees upon trust, to pay the interest to his daughter A for her life and after her

- (a) *Lane v Goudge*, 9 Ves 225.
 (b) *Parkin v Knight*, 15 Sim 83.
 (c) *Balmain v Shore* 9 Ves 500.
 (d) *Billingsley v Wells*, 3 Atk 219;
Balsford v Kibbell 3 Ves 363.
 (e) *Re Turvey*, (1879) 2 Ch 739.
re Amytage v Wilkinson 3 A. C. 355, J 1339, 7 Ed.
 (f) *Jackson v Doer*, 2 H & M 207; *Jeyes v Savage* 10 Ch 555, *Re Knowles* 21 Ch D 606.
 (g) *Swallow v Buns*, 1 K. & J 417;

- Farrer v Barker* 9 Hare 737.
 (h) *Re Wilmot's Trusts* 7 Eq 532.
Frans v Scott, 1 H L C 43.
Jeffrey v Jeffrey, 17 Sim 26, *Day v Day* 3 Ch D 654; cf *Re Stephens* (1927) 1 Ch 1 W 806.
 (i) *Pleale v Burgh* 21 Bear 221.
 (j) *Wharton v Masfeyman* 1875 A C. 186, 193; *Raneemoney v Pemmaney*, 9 C W. N 1033.
 (k) W. 603 n 12 Ed

death to pay and divide the principal among the children of A and the issue of a deceased child as she should appoint, and in default of appointment to go to and be equally divided among them, and if but one then to such only child; the portion of the sons to be paid at their respective ages of 21, and of daughters at that age or on marriage; if no issue or all died before their respective portions became payable, then over; and one of the children of A died under 21 and without issue, *held*, that the shares vested immediately in the children of A though liable to be divested by all dying without issue under 21; that contingency had not happened, the interest of the children, therefore, continued vested and the share of a child dying under 21 passed to his representatives (a). The same rule applies where there is a gift over in case a legatee does not attain a specified age (b) or where there is a gift over in the event of a tenant for life dying without issue (c).

14. Illustration (vi) A gift to a particular person if he shall attain a particular age will be contingent, where the attainment of the requisite age is part of the description of the legatee (d), but if there be a gift over in case the legatee die before that age, the gift over has been held to mean that the gift to the person becomes absolute or indefeasible on his attaining that age and therefore confers a vested interest liable to be divested on his attaining that age (e). The gift over 'sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of being divested on a future contingency' (f). This is shewn in illustration vi (g)

15. Defeasible estates A distinction, however, is drawn between a case of a gift to a person or a class if or when he or they attain 21 with a gift over on death under that age and a gift to such of the children of A as shall attain 21. In the former case the gift to the person or class is a gift upon a contingency which may have the effect of vesting the legacy in the first instance though liable to be divested. In the latter case the gift is contingent, the age being regarded as part of the description and therefore a person who does not attain that age does not answer to the description, and consequently the gift to him fails (h). On the other hand, "Where there is a limitation over, which though expressed in the form of a contingent limitation is, in fact, dependent

(a) *Skey v Barnes*, 3 Mer 340; *Leake v. Robinson*, 2 Mer 363; *Phipps v. Ackers* 9 Cl & F. 583; *Finch v. Lane*, 10 Eq 501, *Re Bevan's Trusts* 34 Ch. D. 716, *Re Firth*, (1914) 2 Ch 386.

(b) *Bland v Williams*, 3 My & K. 411; *Re Bateman's Trusts*, 15 Eq 355

(c) *Bree v Perfect*, 1 Coll 128; see rule discussed in *Ernest v Grey* 48 M L J 707

(d) *Muskett v Eaton*, 1 Ch D 435; *Re Walker*, (1917) 1 Ch 38; *Re Astor*, (1922) 1 Ch 364.

(e) *Doe d Hunt v Moore*, 14 East 601; *Phipps v. Ackers*, 5 Sim.

44, 9 Cl. & F. 583; *Finch v. Lane*, 10 Eq 501; *Fox v. Fox*, 19 Eq 286; but see *Holmes v. Prescott*, 33 L J Ch 264, 272.

(f) *Phipps v Ackers*, 9 Cl & F. 583, 593, *Bull v Prichard*, 5 Hare 567, but see *Price v Hall*, 5 Eq 399 J 1350 sq 7 Ed

(g) *Cf Maseyk v Fergusson*, 4 C. 304

(h) *Festing v. Allen*, 5 Hare 373, *Bull v Prichard*, 5 Hare 567; *Leake v Robinson*, 2 Mer (386); *Price v Hall*, 5 Eq 399; *Re Eddell's Trusts*, 11 Eq 559; *Maseyk v. Fergusson*, 4 C. 304 J 1344 sq 7 Ed

upon a condition essential to the determination of the interest previously limited, the Court is at liberty to hold that, notwithstanding the words in form import contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interest so previously limited. I apprehend the true way of testing limitations of that nature is this. Can the words, which in form import contingency, be read as equivalent to 'subject to the interest so limited' (a).

An estate once vested will not be divested unless all the conditions or events on the occurrence of which the divesting is to take place happens. Thus, where there is a gift to A followed by a gift to his three children or the survivor of them living at the time of A's death, if all three children of A die during the lifetime of A, there being no survivor, the condition as to divesting does not come into operation, so the representatives of all the children will be entitled (b). Where the gift over does not depend on survivorship a different construction will apply (c).

Gifts of this class are to be distinguished from contingent interests, *e g*, where an interest is given to A for life and after his death to the first son of his body if living at the time of his death with gifts over to other sons of A, and in default of sons to the nephew. Here the expression, 'if living at the time of his death' will be construed as a condition precedent and therefore, if A has a son who dies in A's lifetime leaving a child, the nephew of A will take and not his grandson (d). The Court can reject words if they are inconsistent with the intention expressed in other parts of the will, but not in order to avoid holding an interest to be contingent (e). Words implying a contingency may be rejected in order to give effect to a clearly expressed intention of the testator (f). An estate may be limited in partial derogation of a prior estate. The prior gift, in such a case will be affected only to the extent necessary to give effect to the gift over, *e g*, where a testator devises lands to his son B in fee simple, and other lands to his son C in fee simple, subject to a proviso that if either of his sons should die before marriage or before 21 and without issue, the lands would go to the survivor, it was held, the sons took a fee simple subject to a limitation to the survivor for life only in case of either dying unmarried or under 21 and without issue (g). In other words the whole of the prior interest does not fall on the happening of the event, but on the not happening of the event the prior vested interest becomes absolute and indefeasible (h).

A gift over in order to operate as a defeasance must be by express words or words of necessary implication to a definite person or persons (i). Clear

- (a) *McAddison v Chapman* 4 K. & J. 709; *Re Shuckburgh's Settlement*, (1901) 2 Ch. 794.
 (b) *Sturges v Pearson*, 4 Madd. 411; *Penny v Comm of Rye*, 1900 A. C. 628, see *Brown v. Lord Kenyon* 3 Madd. 410; *Re Puckworth*, (1879) 1 Ch. 642; [1339] 7 Ed.
 (c) *Wile v Baker* 2 D. F. & G. 55; *Baldwin v Rogers* 3 D. M. & G. 649; *Cornock v Hadman*,

- 7 Eq. 80.
 (d) *Denn v Radcliffe v Bagshaw*, 6 F. R. 512.
 (e) *Holmes v Cradock*, 3 Ves. 317.
 (f) *Deed Hills v Hopkinson* 5 Q. B. 323.
 (g) *Gentry v Morgan*, 1 Q. B. D. 655.
 (h) *Fearn v Contingent Remainder* 396.
 (i) *Amulya v Alifas* 32 C. 661.

words are necessary to divest a vested interest (a) Where a gift to the children is a vested gift it will not become divested by the use of the words In case the parent dies without leaving no issue which expression should be construed as having had no issue (b) The word leaving is so construed as not to destroy any pr or vested interest (c) unless the intention is plain that the divesting is to take place any how (d)

Presumption in favour of the vesting of a legacy is stronger when it is separated from the bulk of the estate for the purposes of the gift (e) Where a testator after devising his estate in equal shares to four legatees and on the death of any to his issue directed that in default of issue the survivors shall receive the estate of the deceased legatee in equal shares and that so long as a particular legatee mentioned in the will did not attain his majority the whole of the estate would remain undivided held the legatees having survived the testator took absolute vested interests in their respective shares and that the estate was divisible on the legatee mentioned attaining majority (f)

Date of vesting when legacy contingent upon specified uncertain event 120 (S 107). (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent

Exception—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent

Illustrations

(i) A legacy is bequeathed to D in case A B and C shall all die under the age of 18 D has a contingent interest in the legacy until A B and C all die under 18 or one of them attains that age

- (a) *De Souza v Vaz* 12 B 137
Emest v Gray 48 M L J 707
 (b) *Trehearne v Layton* L R 10 Q B 459 463
 (c) *Re Colbold* (1903) 2 Ch 499
fold in Emest v Gray 48 M L J 707 716 see *Re Booth*, (1900) 1 Ch 768
 (d) *Barkworth v Barkworth* 75 L J Ch 754 W 689 90 fn. 12 Ed.

- (e) *Re Wrey* 30 Ch D 507 510;
Re Becan's Trusts 34 Ch D 716
Re Jobson 44 Ch. D 154; *Re Nunburnholme* (1912) 1 Ch 489 J 1392 sq 7 Ed
 (f) *Ellakasse v Duponarain* 5 C. 59
Soorjeemoney Dencandoo 9 M L A. 123 *Re Hill's Trusts* 12 Eq 302 relied on.

A legacy will be contingent when its payment has been made to depend on the happening or not happening of a specified uncertain event. If the event be in its nature certain the vesting is not affected by such condition, but when it is such that it may or may not take place the legacy will be contingent. Thus, where a testator gave to his daughter A £200 to be paid to her at the time of her marriage provided she married with the approbation of his two sons and A died after 21 and without being married, the gift was held to be contingent. Lord Hardwick observed 'I am of opinion this was not a vested legacy, in the common case of legacies to be paid at the age of 21, there is a time fixed, not to the thing itself, but to the execution of it, and the time being so fixed must necessarily come, but where the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this court, where it has been held that the legacy at all events should be paid. The rule as to the vesting is founded upon another rule, *certus est quod certum reddi potest* and it is plain that the testator did not regard the point of time, but the fact that was to happen *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition be fulfilled' (a). Where the testator does not make the gift conditional on the happening of an uncertain event, the legacy will not be contingent (b).

3 Words which ordinarily make a gift contingent. The most common illustration of a condition which goes to make a gift contingent is to be found in cases where nothing is said about payment and a gift is made to a legatee provided he attains a certain age. Thus, where a testator gave his son £200 at the age of 21 the legacy was not vested (c). Similarly, the words 'if' or 'when' (d) in case' (e) 'on' (f), 'from and after' (g), 'provided' (h), would make the gift contingent. These words serve only as illustrations of the rule that where the testator's intention is that payment is to be made upon attainment by the legatee of a particular age and 'none were to take vested interest before the specified time' then the gift will be contingent (i). A gift under a condition of this sort will therefore be contingent when there is no direct gift to any of the legatees or antecedent gifts in favour of other persons from which an inference as to vesting may be drawn (j). Similarly where there is no gift but a direction to transfer *from and after* a given event, the vesting would be postponed till *after that event had happened* unless, from particular circumstances' a contrary intention can be collected (k). In such cases the rights of a legatee will not be prejudiced by undue delay on the part of an executor or administrator in complying with the condition and making the payment for a legatee alive at

- (a) *Atkins v Hicocks* 1 Atk 503
 (b) *Booth v Booth* 4 Ves 399, *West v West* 4 Giff 201
 (c) *Crise v Bailey* 3 P W 20
 (d) *Hansom v Graham* 6 Ves 239,
Philips v Acker 3 Cl & F 702,
 715
 (e) *Ellon v Ellon* 3 Atk 504, *Re Pitkley* 87 L J Ch 247
 (f) *Re Gubar's*, (1905) 1 Ch 570
 (g) *Re Johnson* 44 Ch D 154, *but see Andrew v Andrew* 1 Ch D

- 410
 (h) *Young v Mackintosh* 13 Sim 445;
Atkinson v Turner 2 Atk 41 but
see Simmonds v Cocks 29 Bear
 445 W 795 12 Ed
 (i) *Leake v Robinson* 2 Mer 363,
 335
 (j) *See previous section Hansom v*
Graham 6 Ves 239, *Hansom v*
Willison 7 Ves 420.
 (k) *Leake v Robinson*, 2 Ves 361
 357

the time when such payment could have been made would acquire a vested interest in the legacy and on his death subsequently will transmit his interest to his representatives (a) Thus a 'final division' of the estate has been construed as meaning a period of 12 months after the death of the testator, and where there was a gift over in case of a legatee dying before the final division, the legal representatives of the legatee dying more than a year after the testator were held entitled to the legacy (b)

The words 'pay and divide' or similar words are ambiguous. As has been said, "If there is a gift to a person at 21, or on the happening of any event (as occurred in the case of *Leale v Robinson* (c)) or a direction to pay and divide when a person attains 21, there the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or in the direction to pay and divide. But, if upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied. The interest is vested notwithstanding although the enjoyment is postponed' (d). The words 'pay and divide' used in respect of a future gift, therefore does not necessarily make it contingent (e). Where however possession of the principal is postponed, the prior gift of the interest will make the principal vested in interest (f). But it must not be understood to imply that if a testator has made a gift to take effect in future on the happening of an event, *e g.*, the attainment of a certain age by a legatee or by making such words a constituent part of the description of the object of the gift, the legacy will yet be vested (g). Similarly the expression 'before becoming entitled' means entitled in interest in case of an ordinary legacy, but in case of a substitutional legacy it has been held in reference to the context to mean becoming entitled in possession and not becoming entitled in interest (h).

Where there are several limitations following a contingency, it will affect all the interests if they follow one after the other in an unbroken series, *e g.*, where a residue was given to be divided equally between A and B (the wife of C), and if C survived B, to C for life and afterwards to be divided equally among the four children of B and C, and C survived the testatrix but died in the lifetime of B, held, not only he but the children also took no interest in the legacy (i). But if the gift do not follow in one series, but the ulterior gift is a substantive one not at all relative to the former gift, then the same

(a) *Re Arrowsmith's Trusts*, 2 D G F & J 474, *Re Chaslon*, 18 Ch D 218

(b) *Re Wilkins*, 18 Ch D 634

(c) 2 Mer 363

(d) *Packham v Gregory*, 4 Hare 396, *Leeming v Sherratt*, 2 Hare 14

(e) See above cases, *Smith v Palmer*, 7 Hare 225, *Milroy v Milroy*, 14 Sim 48, *Re Peek's Trusts* 16 Eq. 221, *K Subramaniam v T*

Subramaniam 4 M 124

(f) *Spencer v Wilson*, 16 Eq 501

(g) *Bull v Pritchard*, 5 Hare 567, *Festing v Allen*, 5 Hare 573, *Harrison v Grimwood* 12 Beav 192, *Pearman v Pearman* 33 Beav 394, *Re Walker* (1917) 1 Ch 38 W 803 12 Ed

(h) *Re Maunders* (1903) 1 Ch 451

(i) *Cattley v Vincent*, 15 Beav 198 (see note to the Report)

contingency will not affect both (a) The ulterior gift will not also be affected in a case where the testator has clearly limited the contingency to a prior one (b)

4 Exception. The Explanation to the last section sets out certain cases where from postponement of possession or enjoyment it is not to be inferred that the vesting of interest in the legacy is also postponed The Exception to this section adds another case to the list by stating that even in case of a gift on a condition if there be provision for maintenance in the will, the interest in the legacy will be vested

The rule embodied in the Exception is thus stated (c) "Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest, or directs it to be applied for his benefit the Court considers the disposition of the interest to be an indication of the testator's intention that the legatee should in all events have the principal, and on this ground holds such legacies to be vested" (d) Thus, where there was a gift to each of the testator's three grandchildren of £500 to be paid on attaining 21 or marriage with the consent of the trustees who were to pay the interest as they thought proper, on a legatee dying at the age of 9 his interest was held to be vested and to pass to his next of kin (e) A gift of income until marriage with a direction to transfer the capital at that time has been held to make the legacy vested (f) But a gift has been held to be contingent where there was no direction as to the application of the income during the interval between the death of the tenant for life and the attainment of 21 by her children and there was no indication of the testator's intention as to the vesting of the interests of the children (g) The rule has been thus stated by Jessel, M R "In my opinion where a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given, and not the less so when there is a superadded direction that the trustees shall pay the whole or part of the interest as they think fit" (h)

A gift over on a contingency does not necessarily make the interest contingent where there is a provision in the will for maintenance, etc Thus, a bequest to trustees of the residuary estate with a direction to apply so much of the interest or profits as may be necessary for maintenance and education of the children of the testator's daughter until they should respectively attain the age of 21,

- (a) *Astle v Rice* 8 Taunt 459, *Sheffield v. Earl of Coventry*, 2 D M & G 551, *Partridge v Foster* 35 Bear 545, *Danhan v Wall* 116 J C 30
- (b) *Doult v Lacer* 14 Jur 189, see *Re Blight* 13 Ch D 858
- (c) *Fearne*, C R Butler a note, 552
- (d) *Hansom v Graham* 6 Ves 239
- (e) *Hansom v Graham* 6 Ves 239, approved in *Wharton v Mailsterman* 1195 A C. 186, *Re Gosling* (1933) 1 Ch 443, *De Souza v A.* 12 B 137
- (f) *Re Wren*, 32 Ch D 507
- (g) *Re Johnson*, 44 Ch D 154, see *Foreman v Foreman*, 3 Atk 645,

- Parker v Golding* 13 Sim 418; *Skrimpton v Skrimpton*, 31 Bear 425, *Vowdry v Geddes* 1 Russ & M 209, *Bind v Maybury* 33 Bear 351, *Pearman v Pearman* 33 Bear 394; *Re Peck's Trusts* 16 Eq 221, *Re Bunn* 16 Ch D 47, *Re Wren* 30 Ch. D 507 W. 702 sq 12 Ed Comwll v Rafanbat 27 Bom L. R. 841 C 692 P C.
- (h) *Re Parker* 16 Ch D 44; *Re Williams*, (1937) 1 Ch. 180; *Re Turner* (1897) 2 Ch 739, but see *Re Grimshaw's Trusts* 11 Ch D 406; *Re Martin* (1891) 3 Ch 197, *Re Wittle*, (1896) 2 Ch 711 (See below) J 1346 sq

and then to divide the principal between them, with a gift over in case of any dying under 24 without leaving issue, is not void as too remote, but gives a present vested interest, with an executory bequest over in case of death under 24 without leaving issue (a)

Therefore it comes to this, that words such as, when, if, *etc.*, occurring alone and unqualified may be condition precedents and therefore make the gifts conditional, but the sense may be controlled by expressions and circumstances, so as to postpone payment or possession only and not vesting. One set of such expressions and circumstances will be where the interests of the legatees are directed to be laid out at the discretion of the executors, *etc.*, for the benefit of the legatees. In such cases the legacies will be vested and not contingent (b).

In English law if a part of the income of a legacy be given by way of maintenance, the gift is not necessarily vested (c). If the whole income be given the legacy is deemed to be vested (d). It has been held that even a discretionary power in the trustees to apply the income in and towards maintenance would make the interest of the legatee contingent. It is the gift of the whole income and not the gift of the maintenance which affects the vesting (e).

5. The rule as to gifts to a class. The Exception deals with the case of a gift to a person. The question has been raised whether the rule laid down in the section is confined to gifts to individuals or extends to gifts to a classes (see next section). The rule is now settled that where the gift is of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance does not create a vested interest in a member of a class who does not attain that age (f). Therefore, where an interest of a fund is given to a class of persons but the fund itself is given on the class attaining a particular age, no member who attains that age acquires a vested interest in the fund, unless each individual member of the class is given his proportionate share of the income (g). A gift, therefore, to a class of persons who attain a certain age with a gift of the intermediate income, without any words indicating severance so as to make his own distinct share payable to each, will make the gift contingent (h).

Lord Romilly has thus stated the rule (i). "The court endeavours, no doubt, to construe a gift as vested, if it can, but the authorities are numerous and

(a) *Bland v. Williams*, 3 M & K. 411; but see *Cowart v. Ratanbal*, 27 Bom L R 1; 47 M L J 850

(b) *Hansom v. Graham*, 6 Ves. 239; *Branstrom v. Wilkinson*, 7 Ves. 420; *Re Francis*, (1905) 2 Ch. 295

(c) *Leake v. Robinson* 2 Mer (386); *Russell v. Russell*, (1903) 1 Ir. R. 168; J 1332.

(d) *Fonereau v. Fonereau* 3 Atk 645; *Re Bunn*, 16 Ch D 47.

(e) *Re Gosling* (1902) 1 Ch. 945; *Re Usher*, (1922) 2 Ch. 321.

(f) *Re Merdin*, (1891) 3 Ch 197; *Re Williams*, (1907) 1 Ch 180; *Re Winlle*, (1896) 2 Ch 711, distinguishing from *For v. For*, 19 Eq 286; *De Souza v. Vaz*, 12 B. 137.

(g) *Re Parker*, 16 Ch. D. 44; *Re Martin*, 57 L. T. 471 J 1337 7 Ed.

(h) *Leake v. Robinson*, 2 Mer 363; *Dewar v. Brooke*, 14 Ch. D. 529

(i) *Chance v. Chance*, 16 Beav. 572; see *Locke v. Lamb*, 4 Eq 372.

conclusive that where a gift is made to a class on condition of their filling a particular character, it can only vest in case that condition is satisfied. If a legacy be first given to a person, and the condition added relates only to the time of its payment, as at a particular age, that is good, but if there be no gift, except in the direction to pay at a particular age, the legatee must attain that age before the legacy vests in him, and if that age be too remote, the gift is void (a). Cases have occurred (b) where interest on the legacy being given in the meantime it has been held vested. So if the legacy has been separated from the bulk of the testator's property it has also been held vested (c). (But) where there is no gift except in the direction to pay, and the period of payment violates the rule as to remoteness, it is void. Similarly, 'if upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate, .. the interest is vested although the enjoyment is postponed' (d).

121 (S. 108). Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Illustration

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.

The section. The section applies to the wills of Hindus, etc. See S 22 Transfer of Property Act. S 111 deals with the ascertainment of a class when the gift is unconditional and therefore immediate, the Exception to that section deals with the case where not vesting but possession is postponed. This section deals with the case of a gift to a class subject to a condition, the condition being the attainment of a particular age by the members of a class. The condition, in other words, becomes a part of the description (See S 98). A distinction has to be drawn between a gift to a contingent class, e.g. to the children of A as shall, or who shall, attain 21, in which case the class which may be entitled to the gift is indeterminate, as it cannot be predicated who or how many of the class shall attain 21, and a gift to a class upon a contingency, e.g., to the children of A at or when they attain 21, in which case the class is fixed but any individual member thereof may be debarred from taking if he do not comply with the condition. It is the former class of cases that is dealt with in this section.

A gift as contemplated by this section has again to be distinguished from a defeasible interest, or a gift upon a condition subsequent which may result

(a) *Hunter v. Judd* 4 Sim 455
 (b) As in *Hansom v. Graham* 6 Ves. 237
 (c) *Seaford v. Fowler* 4 Cr. & Ph

154; *Thurston v. Anley* 27 Beav 335; but see *Re John*, 44 Ch D 154
 (d) *Packham v. Gregory*, 4 Har 376

in the defeasance of the interest. The distinction between the two classes of cases has been thus pointed out: "One class is where the devise is to a party at a given age and the property is given over if the party dies under that age. The other is, where the description of the devise is such as to make the given age part of the description. In cases of the former class, the Court has discovered an intention expressed in the will, that the first devise shall take all that the testator has to give, except what he has given to the devisee over; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over. In the other class, the Court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required—that otherwise he did not answer the entire description' (a).

Phipps v. Ackers (b) may be taken as the leading case illustrating the principle of divesting of a vested interest. Here there was a gift to trustees upon trust to convey certain lands to A when he should attain the age of 21 with a gift over in case of A's death before 21, it was held A got an immediate interest which was liable to be divested in case of his death under 21. In other words, the attainment of the age was not a condition precedent making the interest of the legatee contingent but from the context (the gift over more particularly) was construed to point out to an event on the happening of which an estate already vested was to be divested in favour of some other person.

But this construction has no application where the attainment of a certain age is clearly a condition precedent to the vesting of the interest and this is the class of cases which the section deals with. 'It is an established principle of law, recognised by all cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will' (c). As has been observed in *Leake v. Robinson* (d), "If I give to persons of any description when they attain 25, or upon attainment of 25, or from and after their attaining 25, is it not precisely the same thing as if I give to such of those persons as should attain 25? None but a person who can predicate of himself that he has attained 25, can claim anything under such a gift'. In *Bull v. Prichard* (e), the gift was to trustees to convey the testator's estates to the daughter for life and after her death unto and equally between all the children of his daughter who should live to attain the age of 23, the gift was a gift to a contingent class to be ascertained at the death of the daughter and to be confined to those

(a) *Bull v. Prichard*, 5 Hare 567;
Festing v. Allen, 12 M. & W.
220.

(b) 5 Sim. 44 aff'd in 9 Cl. & F.
583; see also *Andrew v. Andrew*,
1 Ch. D. 410; *Musket v. Eaton*,
1 Ch. D. 435; *Jull v. Jacobs*, 3

Ch. D. 703, 713; *Re Greenwood*,
(1903) 1 Ch. 749.

(c) *Duffield v. Duffield*, 1 Dow & Cl.
263 314, *Holmes v. Prescott*, 33
L. J. Ch. 964; *Re Astor*, (1922)
1 Ch. 364.

(d) 2 Mer 326; explained in *Holmes*
v. Prescott, 33 L. J. Ch. 964.

(e) 5 Hare 567.

who attained the age of 23. Therefore, in this class of cases where words of contingency form part of the description of the class of persons who are to take, the words must receive their natural construction and no estate vests in any one until he attains the particular age, unless there is something in the will pointing to a different construction (a). The rule laid down in the section must give way if the testator by suitable words has excluded its application (b). A gift will be void for remoteness if not limited within the period allowed by the rule against perpetuity (c).

The illustration shows that a provision for maintenance will not make the gift a vested one. This is amply supported by authority (d).

CHAPTER IX. OF ONEROUS BEQUESTS

122 (S. 109). Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A having shares in (X), a prosperous joint stock company and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies. B refuses to accept the shares in (Y). He forfeits the shares in (X).

123 (S. 110). Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He will not by this refusal forfeit the money.

The sections. The sections apply to the wills of Hindus, etc. See S 127 Transfer of Property Act.

The rule. The rule embodied in these two sections will appear clear from the following observations in *Guthrie v Walrood* (e). — It appears to me plain that

- (a) *Bal n v Ball n* 7 C 218, Lloyd v Lloyd 3 K. & J. 2.
(b) *De Souza v Par* 12 Bom 137, *Mussett v Eaton* 1 Ch D 435, *Bal n v Ball n* 7 C 218.
(c) *Thomas v Waterhouse* 31 Beav 272.
(d) *Scott v Hall* 15 Beav 50, Lloyd v Lloyd 3 K. & J. 2, *Bal n*

- Prichard* 5 Hare 567; *Re Parker*, 16 Ch D 44. *Re Wille* (1861) 2 Ch 711. But see *Cooper v Cooper* 29 Beav 219. See J 1396 7 Ed.
(e) 22 Ch D 573, *Gunn v Huron* 42 L. J. Ch 157; *Andrew v Trenchard* 9 Ves. 525.

when two distinct legacies or gifts are made by a will to one person he is, as a general rule, entitled to take one and disclaim the other, but that his right to do so may be rebutted if there is anything in the will to show that it was the testator's intention that that option should not exist. For there are cases in which the Court has held that a legatee has no right to take one gift and leave another, because it has discovered an intention on the part of the testator to couple the two gifts together. But in the present case the question arises upon a single and undivided gift, and it appears to me that such a gift is *prima facie* evidence that it is the testator's intention that the gift shall be one, and that the legatee shall either take it or take none of it. The will has to be construed in order to ascertain the testator's intention, *viz.*, whether he sought to bestow a bounty or impose a burden. A gift of a dilapidated building does not mean a liability on the part of the legatee to make extensive repairs (a). Where the two gifts are separate the legatee may accept one and reject the other. The mere fact that the gifts are given in one sentence or in two sentences is immaterial (b).

Illustrations Where the legatee of a house held by the testator on a lease at a reserved rent higher than it could be let for after his death was also given an annuity under the will and the legatee wanted to disclaim the gift of the lease, *held*, it was the intention of the testator that his estate was not to be subject to the rent of the leasehold house the legatee could not, in that respect, disappoint his intention, and retain the benefit given by his will, but must take the gift with the burden (c). But this is so where the obligation is imposed by the bequest (S 122) and not where there are two separate and independent bequests (S 123). In the latter case the legatee can accept the one and refuse the other, in the former case he cannot claim the legacy and repudiate the obligation. The rule applies to gifts of properties subject to encumbrances (d), *e.g.* mortgages *etc.*, and the legatee is bound in such cases to apply the surplus income to keep down the interest upon the encumbered part. As has been observed. If a man chooses to give diverse items of property as one aggregate gift, the net beneficial interest which he gives to the donee, reckoned in pounds, shillings and pence, is the net amount of the profits to be received after discharging the outgoings. When there is a gift of an aggregate the donee cannot refuse a portion of it and take the rest. The testator has chosen to give the property subject to the burden, and the donee taking it cannot refuse to bear the burden whatever it may be (e). How onerous such a gift may be will appear from the case of *Gregg v Coates* (f), where a legatee accepted a gift of right of residence in certain premises so long as he should think proper, "he nevertheless keeping 'the premises' in good and tenantable repair and paying" a rent of £ 100. The premises were accidentally destroyed by fire. The defendant was held liable to reinstate the premises or pay a sufficient sum for that purpose and also to be liable for the rent.

(a) *Warren v Raddall* 1 J & H 1(b) *Re Hotchkys*, 32 Ch D 408(c) *Talbot v Earl of Rndnor*, 3 My & K. 252(d) *Fremm v Law Life Assurance**Society* (1896) 2 Ch 511(e) *Re Kensington* (1902) 1 Ch 203.*Syer v Gladstone*, 30 Ch D 614

(f) 23 Beav 33

A legatee who has refused a legacy may retract his disclaimer if the legacy has not been dealt with in the meantime (a). The disclaimer may be by conduct (b)

CHAPTER X

OF CONTINGENT BEQUESTS.

(124). S 111. Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence

Illustrations.

(i) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(ii) A legacy is bequeathed to A, and, in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(iii) A legacy is bequeathed to A when and if he attains the age of 18, and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(iv) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B dies without children during the lifetime of A.

(v) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death," to C. The words "in case of B's death" are to be considered as meaning 'in case B dies in the lifetime of A'.

1 The section. The section applies to the wills of Hindus, *etc.* Cf S 23 Transfer of Property Act. In S 120 it is stated that a contingent interest does not vest until the condition has been fulfilled. This section imposes a qualification as regards the time of vesting when none has been mentioned in will for the fulfilment of the condition.

When the testator has not fixed any time within which the contingency must be removed, then, according to this section it must be removed before the period of distribution. The section thus relates to a case where there is a gift in favour of a person which at the outset is contingent (for it is to take effect if a specified uncertain event shall happen) and no time has been mentioned in the will for the occurrence of the event. In such a case, the section states, the gift will become vested only if the event happen, and so the contingency be removed before the gift becomes payable or distributable. The gift will fail if the event does not happen and the contingency be not removed before that date. Where there is no reference

(a) *Re Young* (1913) 1 Ch. 272
(b) *Re Clift & Fraser's Contract*, (1924)

2 Ch. 230, W. 955 12 Ed

to any uncertain event, there is no contingency and this section has no application (a) The section is distinguished from S. 129 by the fact that it applies only when the prior bequest is capable of taking effect. If that bequest falls *ab initio* the principle laid down in S. 129 applies (b) This section deals with the case of substitutional gifts to take effect on the happening of specified uncertain events and not with that of gifts of successive interests or remainders (c) This section can have no application where there is a gift over following an absolute gift for the absolute gift can not be cut down by subsequent words (d) Lastly, this section does not apply where the Hindu Wills Act is not applicable (e)

2 The rule The rule and some of the illustrations are obviously taken from the decision of Sir John Romilly M R in *Edwards v Edwards* (f), where four classes of cases are distinguished and discussed (a) where there is a simple gift to A, and, if he shall die, then to B (see illust 1) As no period of time is mentioned in the will, within which A dying the gift to B may take effect, "It is necessarily presumed that the period of time to which the testator refers is the period of possession or payment, i.e., his own death—when the legacy to A will take effect, and that the subsequent limitation is introduced to prevent a lapse of the legacy, in case A do not survive the testator" The gift, therefore, may be read in these terms—a bequest to A, but if A shall die before the bequest becomes vested in him then to B, consequently if A survive the testator, he takes an absolute vested interest in the legacy

(b) where the event spoken of on which the legacy is to go over is not a certain but a contingent event, e.g. to A and in case of his death without children to B In these cases, it has been held, that the *prima facie* meaning is that if at any time, whether before or after the death of the testator A should die without leaving a child the gift over takes effect and the legacy vests in B (g) Here it would be importing a meaning and adding words to the will if it were to be construed to import as a condition which was to entitle B to take, that the death of A without children must happen before some particular period

But the principle will not apply where the context shows a different intention on the part of the testator (h) N B The Indian Legislature has refused to recognise this rule This is made clear by illust (iv), for it says that if A survives the testator the gift over to B does not take effect

(c) If a previous life estate be given followed by a gift to A, and, if he shall die, then to B if A die before the period of possession or payment, i.e., before the death of the tenant for life of the legacy, the legacy goes to B (i) This is in accord with illust (v)

- (a) *Chandra v Prasanna* 38 C 327, 21 M L J 116
 (b) *Radha Prasad v Raneemani* 33 C 947, 10 C W N 695
 (c) *Harendra v Basanta* 22 C W. N 689 691
 (d) *Tripurari v Jagat*, 40 I A 37, 40 C 274 *Suresh v Lalit* 22 C L J 316
 (e) *Prem Singh v Hardit Singh* 80

- I C 1045
 (f) 15 Beav 357 See *Satyaranjan v Annapurna* 48 C L J 523 114 I C. 666
 (g) *Bowers v Bowers*, 5 Ch 244.
 (h) *Re Luddy*, 25 Ch D 394
 (i) *Hervey v McLaughlin* 1 Price 264 cited in *Salisbury v Pelly* 3 Hare 86, see *Re Fisher* (1915) 1 Ch 302

(d) The last class of cases is where a life estate is given to one in the subject of the gift, and on the determination of the estate, the subject of it is given to A with a direction, that if he shall die leaving no child, his share shall go to the survivor. In the absence of any words indicating a contrary intention, the rule is, that these words, indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution. Courts are anxious to avoid a construction so inconvenient as one which must suspend the absolute vesting of the subject of the gift during the whole life of the legatee (a)

3 Modern English law. The ruling of Sir John Romilly in the last class of cases has been criticised by the House of Lords in *O Mahoney v Burdett* (b) and overruled in *Ingram v Soutlen* (c). These cases have been followed in *re Schandhorst* (d). According to the law laid down in these cases the gift over takes effect on the contingency happening at any time and not necessarily before the period of distribution because words must bear their ordinary literal meaning, a view widely different from the Indian law. These modern decisions have no weight in this country, at least in cases where the Succession Act applies, as the old law has been stereotyped by the Indian Legislature. In *Christian v Taylor* (e), death was taken to mean not death at any time but before the period of distribution such being construed to be the intention of the testator.

4 Gift to groups. The general rule is that where there is an immediate gift, i. e., the gift is not subject to any condition or dependent on the happening of any event, to a group of children in specified shares, who are to take as individuals and not as a class those coming into existence after the testator's death are excluded (f). Where the gift is not immediate those coming into existence before the period of distribution are entitled (g).

5. Death as a contingency. The general rule as laid down in English cases is that where the gift is immediate, but in case of death of the legatee there is a gift over to another person, then the words 'in case of' do not mean from the time of the death of the first legatee whenever it may happen so as to restrict his interest to one for life but means death in a certain contingency viz., before the testator. The reason is that death in itself is a certainty, but the testator has spoken of it as a contingency by such words as 'in case of' or 'if he shall die'. Now the only thing uncertain about death is the time of its happening. The testator intends the ulterior gift to take effect in case of the prior legatee dying before a particular period which however he has not specified (h). The words in the event of death of either have been similarly

(a) *Da Costa v Aler* 3 Russ 360.
Galand v Leonard 1 Sw 161.
Re Roberts (1916) 2 Ch. 42.
Christian v Taylor 1926 A. C. 773. but see *O Mahoney v Burdett*,
 L. R. 7 H. L. 353.
 (b) L. R. 7 H. L. 353.
 (c) L. R. 7 H. L. 424.
 (d) (1922) 2 Ch. 234.
 (e) 1926 A. C. 773.

(f) *Butler v Lowe* 10 Sm 317;
Rogers v Maugh 10 C. D. 253;
 but see *Ellars v Hards* 5 Beav.
 45.
 (g) *A. G. v Christie* 1 Pro. C. C.
 536.
 (h) *Cambridge v Ross* 8 Ves 123;
Hume v Paine 2 My. & K. 15
 231.

construed (a) The reasoning holds good also in the case of a gift to two persons with a gift over to the survivor on the death of one of them (b) Where the gift is immediate the only period to which the testator can refer is that of his own death (c) This construction is adopted unless a contrary intention appears by the will, so that those words may also mean death at any time if that construction be favoured by the context (d)

In case of a gift in remainder *e g* to A for life then to B and in case of his death to C, the ordinary rule is that the words 'in case of his death' mean death before the determination of the prior particular estate when the gift over vests in possession, therefore, there will be substitution in case of the remainderman dying before the holder of the prior limited interest (e) There will be substitution even in case of the remainderman dying before the testator (f) The interpretation of death as meaning death at any time does not make it a contingent event, for that is an absolute certainty, hence it is construed as meaning death occurring before a particular period which may or may not take place.

This rule of construction is not applied where there is a gift over, not simply in case of death but there is coupled with it another event which is clearly contingent, *e g*, in case of death without issue or in case of death below a certain age (see illustrs 11 and 10) In such cases a clear contingency is expressed and it is not necessary to construe death as meaning death during the lifetime of the testator, the words of the testator are given full scope The principle of construction adopted in such cases is that the executory limitations take effect on the contingencies on which they are made to depend happening at any time (g) If the contingency happens during the life time of the testator, the ulterior gift takes effect immediately on the testator's death (h) The Indian legislature however has adopted one uniform rule of construction for all cases coming under this section

6 No time is mentioned The mere fixing of the 'nearer limit of time beyond which this specified uncertain event is to happen' cannot amount to the fixing of a definite time as is contemplated by the section, for it does not fix any 'definite point of time at which nor any further limit of time within which that event is to happen' (i) The rule laid down in the section will not apply

(a) *Clarke v Lubbock* 1 Y & C C. 492. *Arthur v Hughes* 4 Beav 506

(b) *Re Fisher*, (1915) 1 Ch 302

(c) *Hinckley Simmons* 4 Ves 160. *Ommancy v Bevan* 18 Ves 291. *Sillokasee v Durpanarain* 5 C. 59

(d) *Cambridge v Rous*, 8 Ves 12

(e) *Girdlestone v Doe*, 2 Sim 225. *Home v Pillans* 2 My & K. 15 22. *Penny v Commissioner Gen.* 1900 A. C. 628

(f) *See v King*, 16 Beav 46.

Cambridge v Rous, 8 Ves. 12; *Le Jeune v Lejeune* 2 Keen 701

(g) *Child v Giblett* 3 My & K. 71. *Bowers v Bowers* 5 Ch. 244. *Duffill v Duffill* 1903 A. C. 491

(h) *Benn v Dixon* 16 Sim 21; *Hues v Jackson* 23 L. J. Ch 51. *King v Cleaveland* 26 Beav 166.

(i) *Monohur v Kariswar* 3 C. W. N. 478. see *Manikyamala v Nanda*, 33 C. 1306 11 C. W. N. 12; *Jehangir v Kai Khushru* 13 Bom. L. R. 141

(d) The last class of cases is where a life estate is given to one in the subject of the gift, and on the determination of the estate, the subject of it is given to A, with a direction, that if he shall die leaving no child his share shall go to the survivor. In the absence of any words indicating a contrary intention, the rule is, that these words, indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution. Courts are anxious to avoid a construction so inconvenient as one which must suspend the absolute vesting of the subject of the gift during the whole life of the legatee (a)

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- (a) *Da Costa v Kier* 3 Russ 360,
Galland v Leonard 1 Sw 161.
Re Roberts, (1916) 2 Ch 42.
Christian v Taylor 1926 A C.
 773, but see *O Mahoney v Burdett*,
 L R 7 H L 383.
 (b) L R 7 H L 388
 (c) L R 7 H L 403
 (d) (1902) 2 Ch 234
 (e) 1926 A C 773

- (f) *Butler v Lowe* 10 Sim 317,
Rogers v Mutch 10 Ch D 25,
 but see *Evans v Harris* 5 Beav
 45
 (g) *A G v Crispin*, 1 Bro C C.
 586
 (h) *Cambridge v Ross* 8 Ves 12,
Home v Pillans, 2 My & K 15,
 201.

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- (a) *Clarke v Lubbock* 1 Y & C C. 497
Arthur v Hughes 4 Beav 506
 (b) *Re Fisher* (1915) 1 Ch 302
 (c) *Hackley Simmons* 4 Ves 160
Ommaney v Bevan 18 Ves 291.
Sillokasee v Durponarain 5 C. 59
 (d) *Cambridge v Rous* 8 Ves 12
 (e) *Girdlestone v Dee* 2 S. M. 225
Home v Pillans 2 My & K. 15 22
Penny v Commissioner
Gc. 1900 A. C. 628
 (f) *Ice v King* 16 Beav 46

- Cambridge v Rous* 8 Ves. 12.
Le Jeune v LeJeune 2 Keen 701
 (g) *Child v Giblett* 3 My & K. 71
Bowers v Bowers 5 Ch. 244
Duffell v Duffell 1903 A. C. 491
 (h) *Benn v Dixon* 16 S. M. 21
Hues v Jackson 23 L. J. Ch 51
King v Cleaveland 26 Beav 165.
 (i) *Monohar v Kassar* 3 C. W. N. 478
see Manjasmala v Nanda
 33 C. 1306 11 C. W. N. 12;
Jehangir v Aal Khushra 13 Bom. L. R. 141

where the event on the occurrence of which the distribution is to take place is mentioned (a) or indicated (b) in the will

7 The period when distributable. These words denote that it has to be determined according to the tenor of the will when the division or distribution is to take place. They are not to be taken in all cases as signifying the time of the testator's death (c). As will be seen from illustrations (i) and (ii) where death is spoken of as a contingency and the gift is immediate, the fund is payable or distributable on the testator's death, i.e. the event must happen before the testator's death, if the gift over is to take effect, when the gift is in remainder as in illustrs (iii) and (iv) the contingency must be removed before the determination of the prior particular estate and therefore the period of distribution of the subject matter of the gift is the time of the death of the prior life tenant (d).

In *Norendra Nath v Kamalbasi* (e), the testator directed, 'My three sons shall be entitled to enjoy all the movable and immovable properties left by me equally. Any one of the sons dying sonless the surviving sons shall be entitled to all the properties equally'. The case closely resembles illust (ii). The specified uncertain event is the death of any of the three sons and the legacy which is to take effect on the happening of this uncertain event is the gift to the survivors, and no time having been mentioned in the will for the occurrence of this event, under this section unless the specified uncertain event happens before the fund is payable, i.e. in this case before the death of the testator, the legacy (i.e. the legacy to the survivor) cannot take effect. One of the testator's sons died sonless after the testator's death. It was held by the Privy Council that the contingency not happening before the period of distribution, viz., the testator's death, the original gift to the three sons in equal shares became indefeasible after the testator's death. The fund was not payable till the youngest attained majority. But this did not affect period of distribution. As was observed, "It would be impossible to hold that the period is to be postponed by reason of the personal incapacity of some of the beneficiaries".

In *Jehangir v Kaikhushru* (f), the testator provided that his two sons P and J would after his death 'be proprietors half and half alike in equal shares' of his whole estate and *inter alia* directed that in case P had no son born to him J was to give away his son as *pulaka* to P. P died after the testator without leaving a natural son and on the third day after his death J gave his own son as *pulaka* to P. It was held that the event on the happening of which the legacy to the adopted son was to take effect did not occur before the testator's death which would be the period of distribution of the legacy. The English rule on this branch

(a) *Bhupendra v Amarendra*, 43 I A 12, 43 C 432

(b) *Ado Gent v Vithaldas* 22 Bom L R 1005, 58 I C 996. The will may have to be construed before the application of this section may be determined, *Gunamani v Debi Prasanna*, 23 C W N 1038, 54 I C 897

(c) *Bhupendra v Amarendra*, 43 I A

12 43 C 432

(d) See next Section Note

(e) 23 I A 18, 23 C 563. *fold in Lala Ramjewan v Dal Koer* 24 C 406; see *Satyaranjan v Annapurna* 48 C L J 523 114, I C 666 (cases reviewed); *Kumud v Jogendra* 21 C W N 854

(f) 39 B 296, 13 Bom L R 141 P. C

of the law as laid down in *Edwards v Edwards* (a) has been adopted in this section. The contingency must happen before the period of distribution which should be taken to be the death of the testator (b)

In *Gurusami v Sivakami* (c) the testator left his properties to his two daughters and provided "If both the said daughters shall have issue, they shall divide the said properties equally. Those who have no issue shall, as aforesaid, enjoy the income for their lives, and those who have issue shall enjoy the whole property." Both the daughters had issue during the testator's lifetime, but after his death one of the daughters died without issue, *held*, on the birth of children to both, they took absolute interests in severalty under the will, the words 'have issue' should not be construed as 'leave issue.' It was not necessary that the daughters should leave issue behind in order to get an absolute interest.

Where a testator authorised his widow to take three sons in adoption and directed that 'On the death of one adopted son and until the adoption of another son by my wife, all my properties shall remain in the ownership and possession of my wife,' and the first adopted son died after attaining majority it was held, the gift over to the widow did not take effect. Here a legacy is given to the widow of the testator if a specified uncertain event, namely, the death of the adopted son of the testator shall happen, the legacy, therefore, cannot take effect unless the specified uncertain event, namely, the death of the adopted son, happens before the period when the fund bequeathed is payable or distributable, whether the period be taken as the death of the testator or the attainment of majority by the adopted son. Therefore the estate had vested absolutely in the adopted son at the time of his death (d)

In *Ramlal v Secretary of State* (e) the time of death of the holder of life estate was construed to be the point of time when it was to be ascertained once for all whether remainderman would take or not

8 Illustrations and decided cases illust (i) In *Ellokasee v Durponarain* (f) a gift to four persons with a proviso that "if any of these four persons happen to die the survivor of them will receive this estate in equal shares" was construed to confer a vested interest in them as they all survived the testator. The case was distinguished from *Soorjeemoney v Denobundoo* (g) by the fact that in the latter case the survivors were to get on the death of a legatee without issue and therefore the event of survivorship referred to the period of the son's death and not to that of the testator. Where a testator gave the residue to his two sons in equal shares absolutely with the proviso that in the event of the subsequent birth of a son he was to get a share, or of a daughter she was to get a legacy no child being born before the period of distribution, *held* the shares of the sons became absolute (h)

(a) 15 Beav 357

(b) *Norendra v Kamalbasini* 23 C 563 P. C. fold

(c) 22 I A 119, 18 M 347.

(d) *Manikyamala v Nanda*, 33 C. 1306, 4 C L J 357

(e) 7 C. 304 10 C. L. R. 349

(f) 5 C. 59

(g) 9 M 1 A 123

(h) *Domodardas v Dayabhai*, 25 I A 126 22 B 833, reversing 21 B 1

Illustrations.

(i) Property is bequeathed to A and B to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

(ii) Property is bequeathed to A for life, and, after his death, to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A, C survives A. At A's death the legacy goes to C.

(iii) Property is bequeathed to A for life, and, after his death to B and C, or the survivor, with a direction that, if B should not survive the testator his children are to stand in his place. C dies during the life of the testator. B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.

(iv) Property is bequeathed to A for life, and, after his death, to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

1. The section. The section applies to the wills of Hindus etc. See S 24, Transfer of Property Act. The rule laid down in the section follows from that in the previous one. It deals with the case of a gift to survivors at some period, the exact period not being specified by the testator. Where the specified uncertain event is the death of all the legatees except one or of some of the legatees, then the gift to the survivor or survivors will not take effect, if no time be mentioned in the will for the occurrence of the event (which is the death of some of the donees), unless such event happens before the time of payment or distribution. It has been provided, however, that this rule will apply 'unless a contrary intention appears by the will' (a).

* The general leaning of the courts in favour of vesting is a reason for construing the survivorship to refer to as early a period as possible' (b). The courts do not like to wait indefinitely to see how would things turn out and then determine whether the gift to the survivor takes effect or not, as that would have an unsettling effect on property. This section applies where the words of survivorship are used to denote the interests of persons who are to take and not where they are used as words of limitation, e.g., to tenants in common with the benefit of survivorship (c).

2 The rule. The rule laid down in the section has been thus stated (d) "I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them and there be no special intent to be found in the Will, that the survivorship is to be referred to the period of division." Therefore all that this decision or this section says is that the survivor alive at the period of distribution will be entitled to the legacy. As will appear from the illustrations, if property be given to two persons,

(a) See *Yethirajulu v. Mukunthu*, 28 M. 363

(b) *Hawkins* 263

(c) *Taffe v. Commes*, 10 H. L. C. 61,

(d) *Cripps v. Wolcott*, 4 Madd. 11, fold in *Howard v. Howard*, 21 Beav. 550, *Re Poultney*, (1912) 2 Ch. 541

with a direction that on the death of one the survivor is to get the whole, then the survivor will be so entitled if the death takes place before the period of distribution.

3. Meaning of 'survivor' The term is susceptible of more than one meaning. As has been observed before, it requires a context to give the word any meaning at all otherwise such questions as survivor of whom? or, survivor when? cannot be answered. It may mean the survivor of the testator, it may mean the survivor at the time of some event contemplated by the will which is being discussed, and what it is must be found out by reference to the context. (a) The natural meaning of the word is the longest liver of the several persons named or referred to. (b) It may also mean not outliving a number of persons but surviving a particular person or surviving a particular period of time. (c) Generally speaking it means living beyond some period. (d) It may also mean that the person who is to survive must be living at the time of the event which he is to survive. (e) A gift over may prevent the word from receiving its natural meaning. (f) It may be construed to mean others. (g) Thus where there was a gift to A and B as tenants in common in tail and if either should die without issue to the survivor of them, on the death of one without issue the other was held entitled to take. (h) Survivors in the plural number may denote a single survivor. (i)

4 Time of payment or distribution. Where a testatrix bequeathed her property to her mother for life and directed that at her death the residue should be equally divided between her surviving brothers and sisters, the word 'surviving,' it was observed, was capable of receiving four different constructions—(i) that it had reference to the date of the will, (ii) that it meant the date of the death of the tenant for life the mother of the testatrix who predeceased the testatrix in this case, (iii) the date of death of the testatrix, (iv) the period of distribution which in the event was at the death of the testatrix. The last meaning was accepted. 'It seems to me that the period which the word surviving' refers is the period when the fund came to be distributed when the event has happened which is to guide the executors in making the distribution.' Therefore on the determination of the life estate prior to the death of the testatrix, the period of distribution was the death of the testator when the distribution took place. (j)

5 Ascertainment of the period of distribution. How is the period to be ascertained? There is no canon for the determination of the period to which survivorship is to be referred except that in an immediate gift it is to be referred to the death of the testator, and if there be a life estate then to the determination of the life estate. (k) It is a rule well established upon the authorities as well as upon principle 'that where there is a clause of survivorship, *prima facie* survivorship means the time at which the property to be divided comes into enjoyment, that is

- (a) *Indermick v Tatchell*, (1903) A C 120, 123
- (b) *Taaffe v Connice*, 10 H L C 64
- (c) *Mellor v Daintree*, 33 Ch D 193, 210
- (d) *Benn v Benn*, 29 Ch D 839, 844
- (e) *Gee v Liddell*, 2 Eq 341

- (f) *Lucena v Lucena* 7 Ch D 255
- (g) *Benn v Benn*, 29 Ch D 839, 844 5 *Leake v Robinson*, 2 Mer 363, 394
- (h) *Smith v Osborne* 6 H L C. 375, 393
- (i) *Hearn v Baker* 2 K & J 383
- (j) *Spurrell v Spurrell* 11 Hare 54
- (k) *Benn v Benn*, 29 Ch D 839, 844

to say, if there be no previous life estate, at the death of the testator, if there be a previous life estate, then at the termination of the life estate ' (a) Therefore, if the gift be immediate, the period of distribution is the death of the testator 'But if a previous life estate be given, then the period of distribution is the death of the tenant for life, and the survivors at such death will take the legacy ' (b) Thus where after a life estate to his wife the testator gave legacies to his children with a direction "if one or other of the children should die," then to the survivor or survivors of them, *held*, the death of the legatee referred to in the will meant death in the life time of the tenant for life (c) If the tenant for life dies before the testator, those who survive the testator take the whole (d)

Where there are several tenants for life, the survivors are ascertained on the death of the last life tenant (e) Where there was a gift to a number of life tenants with remainder to their issue if they should attain 21, and if not then to a class of survivors *held*, the survivors were to be ascertained at the death of the tenant for life or when his last child dies under 21, whichever happens last (f)

6 A contrary intention The rule of construction laid down in this section will apply in cases where the testator has not specified the period of time at which the failure of the prior gifts is to be ascertained (g) 'Surviving' *prima facie* refers to the period of distribution and that must be the construction unless one can find something pointing to a different construction (h) Thus survivorship has been held to refer to the time of recovery of debts from the Crown according to the special intent in the will (i) Where a testator bequeathed his personal estate upon trust to pay the income to his wife till his youngest child attained 21, she maintaining the children in the meantime, then the capital was to be divided among the wife and five children with the benefit of survivorship, the Court observed if the clause as regards survivorship had not occurred in the will each child should have got a vested interest in a share payable on the youngest son attaining 21 But that clause is connected with the period of division so as to show an intention that those children only should take who were living at that time Therefore the representatives of a child who had attained 21 but died before the period of division were not entitled A contrary intention by the testator might give rise to a different construction *eg*, where there was a gift of the income to the children before attaining 21, which showed an intention that if they attained 21 they were to take vested interests (j), or where there was a gift over if all the children died under 21, which implied that the children were to take vested interests (k)

A gift, after a life tenancy, to a class generally, with the benefit of survivorship upon their severally attaining 21, has given rise to different constructions Survivor-

- (a) *Young v Robertson*, 4 Macq 314
319, *Neathway v Reed*, 3 D G
M & G 18
- (b) *Daniell v Daniell* 6 Ves 297,
Hearn v Baker 2 K & J 393,
Naylor v Robson 34 Beav 571
- (c) *Hilton v Field* 9 Beav 368
- (d) *Spurrell v Spurrell* 11 Hare 54
- (e) *Re For's Will* 35 Beav 163
Howard v Collins 5 Eq 349

- (f) *Cancer v Burgess* 7 D M & G 96
- (g) *Bowman v Bowman* 1899 A C
518
- (h) *Re Pickworth* (1899) 1 Ch 642
- (i) *Bindon v Lord Suffolk* 1 P W
96
- (j) *Crozier v Fisher* 4 Russ 393
- (k) *Boucette v Boucette* 16 L J Ch 411
see Gurusami v Sockami 18 M
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ship has been held in some cases to refer to the death of the tenant for life (a). It has been held also to mean those who attained 21 and therefore on a legatee dying before the tenant for life but after attaining 21 his representatives have been held entitled to a share (b). Ordinarily the former construction is to be preferred. Where there is a direct gift to several persons and a gift over, if any die under 21, to the survivors, survivorship has been held to refer to those living at the death of a person dying under 21 (c). Where there is a previous life estate, according to the context, survivorship has been held to refer to the death of the testator (d), or to the death of one of the legatees (e). A slight alteration in the language will alter the construction, because survivorship refers to the immediate antecedent event (f). A gift to brothers after a life estate has been, from the context, held to mean those living at the testator's death instead of at the death of the tenant for life (g). Similarly gifts to children after previous life estates to their parents and others have been held to mean children living at the death of their parents (h). A gift to survivors upon death without issue means no doubt death before the period of distribution (i), but it has also been construed to mean death without issue at any time (j). Of course such a construction cannot be adopted in this country in face of this section.

CHAPTER XI.

OF CONDITIONAL BEQUESTS.

Conditions in India. On the subject of conditions in India the Law Commissioners in their Report state. 'On the subject of conditions we have deemed it right to abstain from introducing into India the very refined distinctions which the Court of Chancery has, in questions relating personal property, borrowed from the Ecclesiastical Courts. We think that the words of the will should be adhered to where no condition inconsistent with law or morality is sought to be imposed, that all bequests made upon illegal, immoral, or impossible conditions should be void, that whatever a testator can do by a limitation he ought to be allowed to do by imposing a condition. It appears also to us that whenever a condition subsequent is valid, if accompanied with a gift over, it ought to be

- (a) *Turing v. Turing*, 15 Sim. 139;
Lill v. Lill, 23 Beav. 446, but
 see *Caner v. Burgess*, 7 D. G.
 M. & G. 96 above.
 (b) *Knight v. Knight*, 25 Beav. 111;
Crozier v. Fisher, 4 Russ. 393.
Trice v. Newland, 5 D. G. & S.
 236.
 (c) *Rickell v. Guillemard*, 12 Sim. 64.
 (d) *Rogers v. Towres*, 9 Jur. 575.
 (e) *Hille v. Baker*, 2 D. F. & J.
 55 J. 2074, 7 Ed.
 (f) *Lislejohn v. Household*, 21 Beav.

- 29, see *Re Pickworth*, (1897) 1
 Ch. 642.
 (g) *Shallor v. Groves*, 16 L. J. Ch.
 367; but see *Howard v. Collins*,
 5 Eq. 347, J. 2064.
 (h) *Drakeford v. Drakeford*, 33 Beav.
 43; *Stannard v. Burt*, 52 L. J.
 Ch. 355.
 (i) *Young v. Robertson*, 4 Macq. 314.
 (j) *Cromer v. Stone*, 3 Russ. 217.
 see *Hille v. Baker*, 2 D. G. & J.
 55.

valid without a gift over, and ought not to be treated as if, it had been inserted merely to frighten the legatee by an unmeaning threat' (a)

What is a condition. A legacy may be either absolute, i.e., indefeasibly vested, or, conditional, i.e., either contingent or vested but subject to be divested according as the legacy either takes effect or is taken away on the happening of an uncertain event. A condition then is a qualification or restriction affecting a gift whereby the interest created 'may either be defeated, enlarged or created upon an uncertain event' (b). A conditional legacy is, therefore, an inchoate interest in the legacy, as it is uncertain whether it shall become absolute or shall take effect at all. "A conditional legacy is defined to be a bequest whose existence depends upon the happening, or not happening, of some uncertain event, by which it is either to take place or be defeated" (c). 'A condition is a thing odious in law' and the reason is obvious. It interferes with the absolute vesting of the estate which the law always favours and it controls the ownership, it seeks to exercise a dominion over the property after the death of the donor. The law looks at it with jealousy (d).

How conditions are to be imposed. Conditions 'can be imposed by any language which is clear enough to show an intention to impose an obligation and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it is to be performed' (e). The testator's intention shall prevail (f). But words are not to be construed as importing a condition if they are fairly capable of another interpretation (g). If capable of such interpretation the interest created will be vested and not contingent (h), or an apparent condition may be construed as a trust (i). Words of an express condition may, in certain cases, be intended as a limitation but the rule is that it shall not ordinarily be so construed (j). Conditions must be exactly and literally performed (k). A condition must be clearly expressed so as to leave no doubt as regards the contingency intended to be provided for, otherwise it would be void for uncertainty (l). Negative or restrictive conditions create obligations which may be enforced provided they are otherwise valid (m).

Two kinds of conditions. Conditions are divided into two classes, conditions precedent and conditions subsequent. A condition precedent creates a condition subsequent destroys an estate. An interest is withheld till the condition precedent is fulfilled. An estate is to arise on its fulfilment. The legatee

(a) Gazette of India, Extraordinary July, 1864 p. 53

(b) Co Litt 201 a

(c) W 812

(d) Egerton v Brownlow 1, 144

(e) Re Williams, (1897) 2 Ch 12

(f) Baslin v Walls 3 Beav 97

(g) Duffeld v Duffeld 1 Dow & Cl

268, 314. Re Francis (1905) 2

Ch 295

(h) Edgeworth v Edgeworth, L R 4

H L 35, 41

(i) Boraston's Case 3 Co Rep 21 W

801 12 Ed

(j) Foot v Cunningham 11 R II Eq 306

(k) Re Hollis' Hospital, (1692) 2 Ch 540

(l) Robinson v Wheelwright 21 Beav 214

(m) Re Viscount Exmouth 23 Ch D

158 Amulya v Kalidas 32 C

161 I C L J 270, Clavering

v Ellison 3 Dr 451 7 H L C

707 Lady Langdale v Briggs 8

D M & G (429 30)

(n) Blagrace v Blagrace 16 L J Ch

346, J 1436 7 Ed see London

S W Ry Co v Gomm, 29 Ch

D 562

has no vested interest till the condition is performed. The condition must be performed before the gift can take effect. A condition subsequent, on the other hand extinguishes an interest whether already vested or contingent; *i.e.*, the gift is defeated on the non fulfilment of the condition. An interest already created is determined by doing or omitting to do an act or on the happening of an event. The former therefore perfects an imperfect title the latter extinguishes it. (a) One therefore affects the acquisition the other the retention of an estate (b)

Whether a condition is to be construed as precedent or subsequent must depend on the intention of the testator to be collected from the whole instrument. No particular form of words is absolutely necessary to express the one condition or the other' and the most strict technical words or form may bend to the clear and manifest intention of the testator. A condition may be subsequent as regards one limitation and precedent as regards the other. Both conditions apply to vested and contingent interests (c)

The question whether a condition is a condition precedent (in which case the interest does not vest until performance) or a condition subsequent (in which case an interest already vested is determined by non performance), is one upon which general propositions can scarcely be laid down that will be of any great assistance. The question must depend on the language of the will and very little help can be derived from decided cases. It has been said that where the condition requires something to be done which will take time the argument is in favour of construing it as a condition subsequent while on the other hand a condition which involves anything in the nature of consideration is in general a condition precedent. The argument in favour of a condition being precedent is strong where the nature of the interest is such as to allow time for the performance of the act before enjoyment and stronger where the condition is capable of being performed *instantly* than where time is requisite for the performance (d)

The same words would make a condition either precedent or subsequent according to the nature of thing and the intention of the parties (e). This makes it all the more difficult for a Court to construe whether a condition is to be regarded as a condition precedent or a condition subsequent. The Court always if possible leans in favour of construing a condition as subsequent and in doubtful cases this construction is always preferred (f). Words which do not clearly or necessarily import a condition precedent will be construed as a condition subsequent (g)

- (a) *Wynne v Wynne* 2 M & Gr 8
 (b) *Egerton v Brownlow* 4 H L C 1 (1878) (states why conditions are so called)
 (c) *Egerton v Brownlow* 4 H L C (157 183 167 188 208 221) see *Re Greenwood* (1903) 1 Ch 749
 (d) *Fitzgerald v Ryan* (1899) 2 Ir R 637, 646 647, see *Re Knox* (1912) 1 Ir 288

- (e) *Acherley v Vernon* 3 Bro P C 107
 (f) *Woodhouse v Hettick* 1 K & J 352 359 60 *Lady Langdale v Briggs* 8 D M & G 391 412 429 430 1 *Egerton v Brownlow* 4 H L C (1823 189) *Re Greenwood* (1903) 1 Ch 749 755
 (g) *Phipps v Ackers* 9 Cl & F 583 *Andrew v Andrew* 1 Ch D 410

or even out of any human power to ensure performance (a) Where the donee does any act which renders compliance with the condition impossible he is disqualified from taking (b) A condition once incapable of performance may now become possible owing to change of circumstances That does not affect the principle but only its application (c)

Gift upon impossible conditions A gift does not vest when there is a condition precedent which is (originally) impossible to perform or becomes impossible by the act of God or from circumstances over which neither the legatee nor the testator had any control (d) if the condition be subsequent the gift takes effect and the condition is void (e) When a condition is intended to operate after the legatee receives the legacy the occasion for any excuse for his not performing the condition arises then and not till then and it is necessary to consider whether he could or could not have performed the condition Impossibility by act of God before the time for performance arrives in case of a condition subsequent does not disentitle the legatee or in case of his death his representative from the legacy (f) An infant is not bound by a condition subsequent if it involves the exercise of will by the infant (g) A condition subsequent may determine or destroy a contingent interest (h)

The question whether a testator himself can dispense with the performance of a condition by the donee or the donee remains bound by a condition imposed by the testator where the condition has been performed by the testator himself subsequently to the execution of the will or nullified in his lifetime or has been put beyond the power of the donee to perform it has given to rise to conflicting decisions In some cases it has been held that performance of the condition by the donee is excused in such cases (i) in other cases the gift has been held to fail because the testator's intention expressed in the will cannot be varied by subsequent events (j)

127 (S 114) A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void

Bequest upon illegal or immoral condition

Illustrations

(i) A bequeaths 500 rupees to B on condition that he shall murder C The bequest is void

(a) <i>Egerton v Brownlow</i> 4 H L C 1 (76 22 23 n)	(f) <i>Re Hollis Hospital</i> (1899) 2 Ch 540
(b) <i>Shyama v Sarup</i> 17 C W N 39 14 1 C 708	<i>Dawson v Oliver Massey</i> 2 Ch D 753
(c) <i>Re Hollis Hospital</i> (1899) 2 Ch 540 553	<i>Goodhart v Woodhead</i> (1903) 1 Ch 749
(d) <i>Re Croxon</i> (1904) 1 Ch 252	<i>Simpson v Vickers</i> 14 Ves 341
<i>Lowther v Cocendish</i> 1 Eden 116	(f) <i>Re Greenwood</i> (1903) 1 Ch 749 756
<i>Priestley v Holgate</i> 3 K & J 26	(g) <i>Re Edwards</i> (1910) 1 Ch 541
<i>Egerton v Brownlow</i> 4 H L C (120)	(h) <i>Egerton v Brownlow</i> 4 H L C 1
<i>Davis v Angel</i> 31 Beav 223 add in 4 D F & J 524	<i>Re Wallace</i> (1920) 2 Ch 274
(e) <i>Atlatie v Rice</i> 3 Madd 256	(i) <i>Re Park</i> (1910) 2 Ch 322 J 1506 7 Ed
<i>Re Grace</i> (1919) 1 Ch 249	(j) <i>Rajendra v Afinalini</i> 48 C 1100
<i>Re Croxon</i> (1904) 1 Ch 252	64 1 C 977 <i>Davis v Angel</i> 31 Beav 223

(ii) A bequeaths 5 000 rupees to his niece if she will desert her husband. The bequest is void.

1 The section. The section applies to the wills of Hindus, etc. See S. 25 Transfer of Property Act and S. 23 Contract Act. The section is based on the principle of law that no subject can lawfully do that which has a tendency to be injurious to the public or against public good. This is called the policy of law or public policy. It is the foundation of law (a).

When questions arise as to conditions or provisions being void as being against the public good or against public policy, great caution is necessary in considering them, at different times very different views have been entertained as to what is injurious to the public. If the conditions imposed be really and in principle against the public good and clearly and directly opposed to the public welfare, they will be void (b). Thus a condition not to enter the military or naval service has been declared to be against public policy and void (c).

2. Test. One rule laid down to test whether a condition is void against public policy is—'Whether there is anything illegal in the object to be attained, and whether, if not illegal, that object is either necessarily or according to the course suggested by the party to be attained by wicked or illegal means' (d). 'All the instances of conditions against law in the proper sense are reducible under one of these heads—First, either to do something that is *malum in se* or *malum prohibitum*. Secondly, to omit the doing of something that is a duty. Thirdly, to encourage such crimes and omissions' (e).

3 Illegal or immoral conditions. "Examples of conditions void as contrary to public policy are conditions inciting the donee to commit a crime (f), to use corruption (g), or to do an act prohibited by law (h), or inciting the donee to exert private or political party influence in any matter or act of state, such as obtaining a title of honour (i), or tending to produce a future separation of an unseparated husband and wife (j), or forbidding the

- (a) *Egerton v Brownlow* 4 H L C. 1, 144 150 196, *Cooke v Turner* 15 M & W 727, 735, 736.
 (b) *Re Beard* (1908) 1 Ch 383.
 (c) *Re Beard* (1908) 1 Ch 383, see also *Davies v Davies* 36 Ch D 359, *Janson v Driefontein* 1902 A C 484, 500.
 (d) *Egerton v Brownlow*, 4 H L C (69).
 (e) *Mitchell v Reynolds* 1 P W 51 cited in *Re Morgan* 14 C W N clxxv, 26 T L R 393 see *Shep Touch* cited in *Re Beard* (1908) 1 Ch 383.
 (f) *Mitchell v Reynolds*, 1 P W 181, 189, *Shrewsbury v Hope-Scott*, 6 Jur

- N S 425, 452 456.
 (g) *Egerton v Brownlow*, 4 H L C 1, (69 99, 172).
 (h) *Mitchell v Reynolds* 1 P W (189) see *Brannigan v Murphy*, (1896) 1 I R 418.
 (i) *Egerton v Brownlow*, 4 H L C 1, (142 150, 163 196), (gifts may be made conditionally on a claim to a title being sustained or on success or failure in a certain suit) see *Fingal v Blake* 2 Moll 50 78, *Re Wallace* (1920) 2 Ch 274.
 (j) See *Wilkinson v Wilkinson* 12 Eq 604, *Re Moore* 39 Ch D 116, See *re Morgan*, 14 C W. N clxxv.

performance by him of any other public duty (a) or unreasonably (b) restraining marriage (c) trade (d) or industry (e) or any other conditions tending to such results (f). A gift conditional on the continuance of immoral relations between the testator and the legatee is void (g).

The civil law drew a distinction between an act which was *malum in se* (wrong in itself) and an act which was *malum prohibitum* (contrary to a rule of law or public policy) with regard to a condition precedent, and declared the gift to be void in the former case but not in the latter (h). But neither the English law nor the Indian law recognises any such distinction. Thus a bequest conditional on the continuance of immoral relations between the testator and the legatee has been held to be void (i). But where the consideration in making the gift is not the continuance of illicit intercourse the condition is not illegal and the gift will be valid (j).

4 Conditions in restraint of marriage Such conditions are bad but a gift to a legatee till marriage is good (k). Marriage during the testator's lifetime involves forfeiture of the legacy (l) but not where there has been a republication of the will after such marriage (m). A condition in partial restraint of marriage however is good (n) e.g. restraining a widow from remarriage (o) or requiring consent for marriage (p) or restraining marriage before a certain age (q) or restraining marriage with people of a certain nationality or faith (r) or class (s) or requiring the observance of a certain form e.g. requiring the marriage to be solemnised in a certain manner (t).

5 Restrictions on enjoyment Restrictions on the enjoyment of an absolute gift or restrictions inconsistent with the nature of the interest conferred

- (a) *Re Morgan* 26 T L R 398 (condition requiring children not to live with the father if separated from his wife), *Re Sandbrook* (1912) 2 Ch 471 (condition forfeiting benefit if donee live with or be under the control of their father), see *Re Boulter* (1922) 1 Ch 75 (condition subsequent) cf *Colston v Morris* 6 Mad 89 (condition not to interfere with daughter's education enforced) J 1438.
- (b) *Nordenfelt v Maxim Nordenfelt & Co* 1894 A C 535.
- (c) *Lloyd v Lloyd* 2 Sm N S 255 263 *Morley v Rennoldson* (1895) 1 Ch 449 *Hartley v Rice* 10 East 22 see *Bellairs v Bellairs* 18 Eq 510.
- (d) *Cooke v Turner* 15 M & W 727 736 *Egerton v Brownlow* 4 HL C. (18 n).
- (e) *Cooke v Turner* 15 M & W 727 736 (donee to leave his land uncultivated) *Egerton v Brownlow*, 4 H L C. (144 241).
- (f) *Egerton v Brownlow* 4 H L C. 1 144 241 *Wilkinson v Wilkinson* 12 Eq 604 (condition relating to residence of a married woman) H

- Vol 28 p 585 See J 1437 sq 7 Ed.
- (g) *Tayaramma v Silaramasami* 23 M 613.
- (h) See W 815 16 12 Ed re *Morgan* 14 C W N clxxv *Mitchell Reynolds* 1 P W 181 sold so.
- (i) *Tayaramma v Silaramasami* 23 M 613.
- (j) *Lachmi v Wilayti* 2 A 433 *Ram Sarup v Bela* 11 I A 44 6 A 313.
- (k) *Potter v Richards* 24 L J Ch 455.
- (l) *Re Boddington* 25 Ch D 685.
- (m) *Cooper v Cooper* 6 Ir Ch 217.
- (n) *Scott v Tyler* 2 W & T L C 115 2 Bro C C 431.
- (o) *Allen v Jackson* 1 Ch D 399.
- (p) *Re Whiting's Settlement* (1905) 1 Cl 96.
- (q) *Stackpoole v Beaumont* 3 Ves 89.
- (r) *Perrin v Lyon* 9 East 170 *Hodgson v Halford* 11 Ch D 959.
- (s) *Jenner v Turner* 16 Ch D 188 *Greene v Kilwood* (1895) 1 Ir R 130.
- (t) *Haughton v Haughton* 1 Moll 611 J 1497 7 Ed.

are bad, (S 138) But this does not mean that a limited interest cannot be created, so that, on infringement of a condition or the happening of an event the subject matter of the gift will go over^a to somebody else Accordingly it has been held that a forfeiture clause, limiting an estate till bankruptcy of the legatee or till he attempts to alienate it, is good (a)

128 (S. 115). Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with

Illustrations

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B C, D and E A marries with the written consent of B C is present at the marriage D sends a present to A previous to the marriage E has been personally informed by A of his intentions and has made no objection A has fulfilled the condition

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B C and D D dies A marries with the consent of B and C A has fulfilled the condition

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D A marries in the lifetime of B C and D, with the consent of B and C only A has not fulfilled the condition

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B C and D A obtains the unconditional assent of B, C and D to his marriage with E Afterwards B C and D capriciously retract their consent A marries E A has fulfilled the condition

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B C and D A marries without the consent of B C and D, but obtains their consent after the marriage A has not fulfilled the condition

(vi) A makes his will whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage A dies The bequest to B takes effect

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will The document is executed by A within a reasonable time, but not within the time specified in the will A has not performed the condition and is not entitled to receive the legacy

1 The section The section applies to the wills of Hindus, etc See S 26 Transfer of Property Act The ordinary rule is that where a legacy is given upon performance of a condition unless that condition be performed the legatee

(a) *Brandon v Robinson* 18 Ves 433, *Re Machu* 21 Ch D 838 *Re* {

Forder (1927) 2 Ch 291 W 818 12 Ed

performance by him of any other public duty (a) or unreasonably (b) restraining marriage (c) trade (d), or industry (e) or any other conditions tending to such results' (f) A gift conditional on the continuance of immoral relations between the testator and the legatee is void (g)

The civil law drew a distinction between an act which was *malum in se* (wrong in itself) and an act which was *malum prohibitum* (contrary to a rule of law or public policy) with regard to a condition precedent, and declared the gift to be void in the former case but not in the latter (h) But neither the English law nor the Indian law recognises any such distinction Thus a bequest conditional on the continuance of immoral relations between the testator and the legatee has been held to be void (i) But where the consideration in making the gift is not the continuance of illicit intercourse, the condition is not illegal and the gift will be valid (j)

4 Conditions in restraint of marriage Such conditions are bad but a gift to a legatee till marriage is good (k) Marriage during the testator's lifetime involves forfeiture of the legacy (l) but not where there has been a republication of the will after such marriage (m) A condition in partial restraint of marriage however is good (n) e g, restraining a widow from remarriage (o) or requiring consent for marriage (p), or restraining marriage before a certain age (q), or restraining marriage with people of a certain nationality or faith (r) or class (s), or requiring the observance of a certain form e g requiring the marriage to be solemnised in a certain manner (t)

5 Restrictions on enjoyment Restrictions on the enjoyment of an absolute gift or restrictions inconsistent with the nature of the interest conferred

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| <p>(a) <i>Re Morgan</i> 26 T L R 398 (condition requiring children not to live with their father if separated from his wife), <i>Re Sandbrook</i> (1912) 2 Ch 471 (condition forfeiting benefit if donee live with or be under the control of their father), see <i>Re Boulter</i> (1922) 1 Ch 75 (condition subsequent) cf <i>Colston v Morris</i> 6 Mad 89 (condition not to interfere with daughter's education enforced) J 1438</p> <p>(b) <i>Nordenfelt v Maxim Nordenfelt & Co</i> 1894 A C 535</p> <p>(c) <i>Lloyd v Lloyd</i> 2 Sim N S 255 263, <i>Morley v Rennoldson</i> (1895) 1 Ch 449 <i>Hartley v Rice</i> 10 East 22 see <i>Bellairs v Bellairs</i> 18 Eq 510</p> <p>(d) <i>Cooke v Turner</i> 15 M & W 727, 736, <i>Egerton v Brownlow</i> 4 H L C. (18 5)</p> <p>(e) <i>Cooke v Turner</i> 15 M & W 727 736 (donee to leave his land uncultivated) <i>Egerton v Brownlow</i>, 4 H L C. (144 241)</p> <p>(f) <i>Egerton v Brownlow</i> 4 H L C 1 144 241 <i>Wilkinson v Wilkinson</i> 12 Eq 604 (condition relating to residence of a married woman) H</p> | <p>Vol 28 p 585 See J 1437 19 7 Ed</p> <p>(g) <i>Tayaramma v Silaramasami</i> 23 M 613</p> <p>(h) See W 815 16 12 Ed, re <i>Morgan</i> 14 C W N clxxv <i>Mitchell Reynolds</i> 1 P W 181 reid 10</p> <p>(i) <i>Tayaramma v Silaramasami</i> 23 M 613</p> <p>(j) <i>Lachmi v Wilayti</i> 2 A 433, <i>Ram Sarup v Bela</i> 11 1 A 44 6 A 313</p> <p>(k) <i>Potter v Richards</i> 24 L J Ch 488</p> <p>(l) <i>Re Boddington</i> 25 Ch D 685</p> <p>(m) <i>Cooper v Cooper</i> 6 Ir Ch 217</p> <p>(n) <i>Scott v Tyler</i> 2 W & T L C 115 2 Bro C C 431</p> <p>(o) <i>Allen v Jackson</i> 1 Ch D 399</p> <p>(p) <i>Re Whiting's Settlement</i> (1905) 1 Ch 96</p> <p>(q) <i>Slackpoole v Beaumont</i> 3 Ves 89</p> <p>(r) <i>Perrin v Lyon</i> 9 East 170 <i>Hodgson v Holford</i> 11 Ch D 959</p> <p>(s) <i>Jenner v Turner</i> 16 Ch D 188, <i>Greene v Kirkwood</i> (1895) 1 Ir R 130</p> <p>(t) <i>Haughton v Haughton</i> 1 Moll 611 J 1497 7 Ed</p> |
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are bad, (S 138) But this does not mean that a limited interest cannot be created, so that, on infringement of a condition, or the happening of an event, the subject matter of the gift will go over to somebody else. Accordingly it has been held that a forfeiture clause, limiting an estate till bankruptcy of the legatee or till he attempts to alienate it, is good (a)

128 (S. 115). Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Illustrations.

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B, C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(vi) A makes his will whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.

1. The section. The section applies to the wills of Hindus, etc. See S 26 Transfer of Property Act. The ordinary rule is that where a legacy is given upon performance of a condition, unless that condition be performed the legatee

(a) *Brandon v Robinson*, 18 Ves 433,
Re Machu, 21 Ch. D 838. *Re*

Forder, (1927) 2 Ch 291 W.
818 12 Ed

does not become entitled to the legacy (a) The common law took a narrow view and insisted upon a strict performance of the condition But the rigour of the common law was mitigated in this respect as in many others by equity, and the equitable view has been adopted in this section A condition precedent therefore is deemed to be performed within the meaning of the testator if executed *cy pres* when the whole cannot be literally fulfilled from unavoidable circumstances The principle is the presumption of the testator not requiring the performance of impossibilities and that his intention will be substantially carried into effect by permitting it to be executed as far as it can be done (b) This principle of substantial compliance is more particularly applied in cases requiring consent to marriage (c) The illustrations except the last it will be seen are taken from the same class of cases

2 Consent to marriage The consent must be free consent and is vitiated by misconduct (d) A general consent or a consent evidenced by conduct or presumed from the circumstances or a conditional consent where the condition attached is afterwards performed, or a subsequent approbation (in special cases) may be considered as a substantial compliance with the condition even in cases where a consent in writing is required by the will (e) A consent may however, be rendered nugatory by reason of other circumstances *e g* where there is a gift to a person on attaining 21 or marriage with the consent of A no consent is necessary in case of marriage after attaining 21 (f) or where a legacy of £400 was to be paid within a year of the testator's death but in case the legatee married A she would be paid a shilling she married A after a year from the testator's death, *held* she was entitled to £400 or where one of two conditions has become infructuous (g) As a general rule consent where imposed is necessary in case of first marriage only and not of any subsequent one (h) The consent of executors who had not acted is not necessary (i)

3 Executor under no duty to inform legatee of condition It is clear upon authority and principle that neither ignorance illness nor neglect on the part of the executor to inform the legatee can excuse him for not complying with the direction so as to entitle him to the gift (j) It seems settled that there is no duty on executors to inform legatees of the existence of conditions attached to legacies (k) A legatee cannot plead ignorance of conditions (l)

- (a) *Robinson v Wheelwright* 21 Beav 214 *Priestley v Holfgate* 3 K & J 245, *Tulk v Houlditch* 1 V & B 248 See *Kearabhadra v Chitrangid* 32 I A 105 28 M 173
- (b) Roper on Legacies cited in *Dawson v Oliver Massey* 2 Ch D 753 758 Story S 291
- (c) *Re Brown* (1904) 1 Ch 120 *Re Smith* 44 Ch D 654 *Dawson v Oliver Massey* 2 Ch D 753 H Vol 28 p 593
- (d) *Re Stephenson's Trusts* 18 W R 1066
- (e) H. Vol 25 p 597

- (f) *Desbody v Boyville* 2 P W 547, *Osborn v Brown* 5 Ves 527
- (g) *Knight v Cameron* 14 Ves 389, *Collett v Collett* 12 Jur N S 120 but see *Chauncey v Graydon* 2 Atk 616 W 831, 12 Ed
- (h) *Hutcheson v Hammond* 3 Bro CC 128 *Crommelin v Crommelin* 3 Ves 227
- (i) *Worthington v Elans* 1 Sim & Stu 165
- (j) *Re Hodge's Legacy* 16 Eq 92
- (k) *Re Mackay* (1905) 1 Ch 25, *Billebank v Goodwin* 5 Eq 545 not told
- (l) *Asley v Earl of Essex* 18 Eq 290

4 Illustrations The illustrations are intended to show what is meant by the words 'substantially complied with'

Illust. (a) Substantial compliance may be inferred from the acts (a) or conduct (b) of the executors. A general consent is sufficient (c). In case of consent of executors or trustees that of those who act is sufficient (d). After the lapse of 28 years, a consent to a marriage, so as to avoid a forfeiture was, under the special circumstances, presumed (e). Where a legatee was required to appear personally before the executors, but she was too old and infirm for the purpose, *held*, the condition was complied with by one executor and the agent of the other attending on the legatee (f). A condition requiring living at a specified time or at a particular place is satisfied by the legatee having a place of residence there though he may be travelling abroad (g).

Illust (ii) Where a gift is made on condition of a legatee marrying with the consent of her parents, but one of the parents died before the testator, marriage with the consent of the surviving parent was held sufficient compliance with the condition (h). But this rule was not extended to a case of consent of a guardian. It was held a proper guardian should have been appointed by the Court and his consent obtained. The consent of a guardian appointed by the infant herself would not be sufficient (i). Where a testatrix gave a life estate to A and remainder to X and Y and an option to purchase to B to be exercised within a year after A's death, and A died before the testatrix *held*, the option could be exercised within a year after the testatrix's death (j).

Illust (iii) Consent of the majority of executors or trustees is not sufficient (k).

Illust (iv) A consent to marriage may be withdrawn on good reason. The court is at liberty to examine whether a refusal proceeds from a vicious, corrupt or unreasonable cause. The trustee or executor however, is not to show his reason for dissent (l). It is justifiable for persons *in loco parentis* to change their minds under reasonable circumstances but such retraction must not be *ad libitum* or proceed from mere caprice (m).

Illust (v) The rule has been thus stated by Sir J Romilly "I am of opinion that this is a condition precedent and that if the consent of the trustees was not given before marriage the legacy was forfeited" (n). But in *Pollock v. Croft* (o) a general permission to marry and subsequent approbation of a marriage contracted under such general permission but without the knowledge of the executor was held sufficient compliance with the condition.

- (a) *Re Smith*, 44 Ch D 654
 (b) *Re Birch*, 17 Beav 358
 (c) *Pollock v Croft* 1 Mer 181
 (d) *Worthington v Goans* 1 Sim & St 165, but see *Clarke v Parker*, 19 Ves 1
 (e) *Re Birch* 17 Beav 358
 (f) *Tanner v Tebbutt*, 2 Y & C C C 225
 (g) *Woods v Townley* 11 Harc 314 J 1453 4, 7 Ed

- (h) *Dawson v Oliver Massey* 2 Ch D 753
 (i) *Re Brown's Will* 18 Ch D 61
 (j) *Evans v Stratford*, 2 H & M 142
 (k) *Clarke v Parker* 19 Ves 1, 17 24
 (l) *Clarke v Parker*, 19 Ves. (13, 18 22)
 (m) *Re Brown* (1904) 1 Ch 120
 (n) *Re Birch* 17 Beav 358
 (o) 1 Mer 181 W 830, 12 Ed

Illust (vi) Where a testator gave his trustees power if his daughter married with their consent to appoint part of her fortune on her death to her husband and she married during her father's lifetime and with his consent held the condition was substantially complied with and the gift to the husband took effect (a) The reason is that the consent of the testator is more to be regarded than any consent of trustees to whom he had delegated a power to consent in case of a marriage after his decease (b) The testator's consent is limited to marriage before his death (c)

Illust (vii) This illustration forms an exception to the rule that a condition precedent will be considered to be performed if substantially complied with The rule has been thus stated —

Where the testator has prescribed a period within which a condition must be performed this period must be strictly observed (d) This rule however is subject to certain exceptions Thus it is subject to the jurisdiction of the court to grant relief from forfeiture *e.g.* where performance has been prevented by the contrivance of the executors (e) or other persons interested (f) and by no fault of the donee (g) or where the condition is in the nature of a penalty (h) or where no date has been fixed by the testator on compensation being made for the delay Except in such cases the Court cannot give relief at all (i) Thus where a legacy was given to A on condition that she conveyed an estate to B within a certain time but the estate was settled on A without power of anticipation held as compliance with the condition was impossible A lost the legacy (j)

4 Miscellaneous A payment of a smaller sum is not substantial compliance with the condition (k) nor a condition requiring return to England complied with by embarking on a British ship (l) nor a condition requiring a settlement of land to certain uses satisfied by settlement upon other uses (m)

129 (S 116) Where there is a bequest to one person

and on failure of prior bequest to B and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator

- (a) *Tweedale v Tweedale* 7 Ch D 633
- (b) *Clarke v Berkeley* 2 Vern 720
- (c) *Booth v Meyer* 38 L T 125
- (d) *Simpson v Vickers* 14 Ves 341
- (e) *Brooke v Garrod* 2 D G & J 62
- (f) *Austin v Tawney* 2 Ch 143
- (g) *Re Glubb* (1900) 1 Ch 354 As to how time is computed see *Leslie v Garland* 15 Ves 249.
- (h) *Gosd v Lowndes* 11 Sim 434
- (i) *Brooke v Garrod* 2 D G & J 62
- (j) *D'Aquila v Drinkwater* 2 V & B 225
- (k) *Clarke v Paiber* 19 Ves. 1 17

- (l) *Priestley v Holgate* 3 K & J 286
- (m) *Clarke v Priestley* 19 Ves. 1
- (n) *Dashwood v Bulkeley* 10 Ves 230 239
- (o) *Robinson v Wheelwright* 6 D M & G 535
- (p) *Caldwell v Cresswell* 6 Ch 278
- (q) *Priestley v Holgate* 3 K & J 286 cf *Re Atlib &c* (1891) 1 Ch 601
- (r) *McIntyre v Beaulieu* 3 Bro P C 277
- (s) *Scarlett v Lord Abinger* 34 Bear 338 J 1453 7 Ld

Illustrations

(i) A bequeaths a sum of money to his own children surviving him, and, if they all die under 18 to B. A dies without having ever had a child. The bequest to B takes effect.

(ii) A bequeaths a sum of money to B on condition that he shall execute a certain document within three months after A's death, and, if he should neglect to do so to C. B dies in the testator's lifetime. The bequest to C takes effect.

1. *The section* The section applies to wills of Hindus, etc. See S 27 Transfer of Property Act. The section does not provide for the ordinary case of a gift over on the natural termination of a prior interest, in other words, to a vested remainder, *eg.* to A for life with remainder to B, in which case the gift to B takes effect, being a vested remainder, whenever the prior interest of A ceases. It deals with a gift upon a condition but not, as in the last section with the question as to what is to be considered to be a compliance with the condition on which the prior gift depends but rather with the effect of non compliance or failure of the condition on which the ulterior limitation takes effect (a). The effect of a gift over is to convert a condition into a conditional limitation. Thus in illust (ii) above if the gift was on condition that he should execute a certain document within three months after A's death, then under last section (see illust vii) the execution of the document would have been a condition precedent and failure to comply with the condition would have meant forfeiture of the legacy, but because the words of condition are followed by a gift over to C the condition is converted into a conditional limitation. The section is confined to cases of conditional limitations *i.e.* to cases where the ulterior estates are so limited as to take effect by determining prior interests on the happening of events which are uncertain in their nature, but which must happen before the natural determination of the prior estates, if the ulterior gifts are to take effect at all. In such cases the Courts do not insist upon the strict performance of the conditions but pay regard in the construction to the substantial effect of the contingencies specified, and so to the real intent of the testator.

2. *The rule* The rule has been thus laid down — 'Instances have however frequently occurred in which the court has concluded, from the context of the Will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition as a clause of *conditional limitation* so as not to require, as in the case of a gift on a condition, that the very event, on which the gift is made contingent, must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified and so to the real intention of the testator' (b). Therefore, it comes to this that in case of a gift upon a condition, the very event on which the prior estate is to determine must happen in order to defeat it, but in case of a conditional limitation that is not so, provided it appear clear from the will that the testator intended the ulterior gift to take effect in any event (S 130).

(a) See *Murray v Jones*, 2 V & B 313, 322

(b) W 820-1, 12 Ed

Where there is a gift with a conditional limitation, if the prior gift fails altogether, *e g.*, by reason of the non-existence of the object of the gift, either by the object never coming into existence (Illust i) or by the object dying in the testator's lifetime (Illust ii), the question arises whether the ulterior bequest can take effect, "in whatever form that failure may take place, even if it be not in the precise manner expressed in the terms of the gift" (a). In other words, the question is, does the failure of the testator to provide for the event which has actually happened involve a failure of the ulterior gift? The section provides for a case of this kind and lays down that the failure of the prior bequest in the manner actually occurring though not contemplated by or provided for by the testator does not involve a failure of the ulterior bequest.

3 Condition and conditional limitation. It has been pointed out that "There is considerable resemblance as well as difference between conditional limitations and estates depending on condition subsequent. The difference consists in this that in conditional limitations 'the estate determines as soon as the contingency happens, and the estate in remainder, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy', but in estates depending on condition subsequent, the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition and avoid the estate by asserting their rights, or by entry. Further, in a condition subsequent, the condition is something superadded to the limitation but in a conditional limitation, the condition is not superadded, but is itself a part of the limitation. Thus, a grant to A for life, but if B should return from England then the grantor to re enter and determine the grant, is a grant subject to a condition subsequent, but a grant to the use of A until B return from England and then to C, in fee, would be a conditional limitation, though A would take practically the same interest" (b).

4 Cases (i) *Where the object never came into existence.* In *Jones v. Westcomb* (c), a testator gave a term of years to his wife for life and after her death to the child she was *enroute* with and if such child died under 21, one third to his wife and two thirds to others, and the wife was not *enroute*, *held*, the gift over took effect. Where the testator made various provisions out of the residue of his estate in favour of his children and, in case all the children died under 21, he gave the residue to his wife and the testator died without ever having had a child, *held* that the bequest to the wife, took effect (d). Where a testatrix left the residue of her personal property to her children and provided that in case she should die leaving only one child surviving her the property should go to another family, and she died without having had a child the

- (a) *Okhoymoncy v Nilmoney*, 15 C 282, 291, *Durga v Raghunandan* 19 C W N 439
 (b) M 435 f n
 (c) 1 Eq Ck Abr 245, see *Foster v Cook*, 3 Bro C C 347, *Wing v Angrave* 8 H L C 183, 200. *Re Graham* (1929) 2 Ch 127.

- Walson v Young* 28 Ch D 436 W 621 f n 12 Ed *Okhoymoncy v Nilmoney* 15 C 282
 (d) *Meadows v Parry*, 1 V & B 124; see also *Fonnereau v Fonnereau*, 3 Atk. 645, *Newburgh, Earl of v Gyre*, 4 Russ 454

Court observed, "when having but one child is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfilment of the condition, unless the consequence be relative to that one supposed child," because the having one child "is no part of the condition on which the supposed consequence is to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made," i.e., the ulterior gift shall take effect. The gift over depended on the failure of the interest which preceded it, but the testator did not specify all the modes in which that interest might fail (a)

(ii) *Where the object died in the testator's lifetime* Gift over on neglect or refusal to do an act is illustrated in the case of *Atelyn v. Ward* (b). There the testator devised his real estate to his brother A and his heirs on condition that he should within three months of the testator's death execute and deliver to the trustee a general release of all his demands against the estate, but in case A should neglect to give such release, the gift to him was to be null and void and the property was to go to B and his heirs. A died in the testator's lifetime, *held*, the gift over took effect. Lord Hardwicke observed "if the precedent limitation by what means soever is out of the case, the subsequent limitation takes effect" (c)

(iii) *Other cases of failure.* The principle laid down in *Atelyn v. Ward* (d) has been applied where gifts to charities are followed by gifts over and the former are void by reason of some rule of law. As has been said by Wood V C "I cannot see any substantial distinction between the cases to which I have referred of a devise over after a devise to a nonentity, if the nonentity should die under age, or again of a devise over after a devise to a deceased person, if the deceased person should fail to do a certain act, and the case before me of a devise to a charity which can not take followed by a devise over in the event of that charity which can not take omitting to perform a certain act (e). Where there was a gift to A and then to A's daughter, but in case she did not survive her mother and attain 21, to B, and A's daughter attained 21 and did not survive her mother, *held*, the gift over to B took effect, the testator's intention being construed to be that it was to take effect in the event of the child of A not surviving her and attaining 21 (f). Where a testator made a gift over in favour of the daughter in case his son, to be taken in adoption, died under 18 without issue, and the adoption proved to be invalid, *held*, the gift over took effect by necessary implication (g)

In these cases it is not necessary that every particular fact should take place but the condition should be construed according to the sense and intention of the testator, that if in any event the first gift failed the second should take

(a) *Murray v Jones*, 2 V & B 313
 (b) 1 Ves Sen 420
 (c) *Doe d Wells v Scott*, 3 M & Sel 300
 (d) 1 Ves Sen 420
 (e) *Warren v Ruddall* 4 K & J 603, on app *Hall v Warren*, 9

H L C. 420
 (f) *Mackinnon v Sewell*, 5 Sim 78, *affd* 2 My & K. 202, *Brock v Bradley* 33 Bear 670, *Re Laing* (1912) 2 Ch 386 W 821, 12 Ed
 (g) *Raneemont v Premmoney*, 9 C W N 1033 *affd* 33 C 957

effect (a) Where there was a gift to A so long as she remained unmarried and in the event of her marriage to B, and A died unmarried, B was held entitled to the estate (b).

5 An exception. The rule does not "enable a gift over to take effect on an event not provided for where the prior donees come into existence and satisfy the conditions of their gift during the life of the testator and the failure of the prior gift is due to lapse by the deaths of the prior donees in the life of the testator," (c), *e g* a testator leaves a legacy in trust for A until she attained 21 when to be transferred to her her executors, *etc*, and in case A should die under 21 leaving children, in trust for such children, but in case A should die under 21 without leaving children, then over, A attained 21 and died in the lifetime of the testator leaving children, *held*, the legacy lapsed (d) Similarly in case of gifts to a class, *e g*, to A for life and then to his children absolutely, if A should die without issue, then over, A died in the testator's lifetime leaving a son who also predeceased the testator, *held*, the gift over failed (e)

130 (S. 117). Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner.

When second bequest not to take effect on failure of first

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her A and his wife perish together, under circumstances which make it impossible to prove that she died before him the bequest to B does not take effect

The section. The section applies to wills of Hindus *etc* See S 27 Transfer of Property Act It has been already stated in the notes to the last section that a gift over does not fail on the failure of the testator to provide for the event which has actually happened, but the gift over takes effect, even if the exact event contemplated by the testator on the happening of which the prior estate was to determine has not happened But this principle applies when the testator's intention is clear that the ulterior gift is to take effect in any event The Court allows the gift over to take effect because of necessary implication Therefore, it is on the ground and with the object of giving effect to the

- (a) See *Raneemoney v Premmoney*, 9 C. W. N 1033, on app 33 C 957; *Warren v Ruddall* 4 K & J 603; *Re Sanders Trusts* 1 Eq 681; *Re Gibson*, 2 Eq 669; *Edgeworth v Edgeworth* L. R 4 H L 35
- (b) *Galon v Hewitt*, 2 Dr & Sm 184; *Stanford v Stanford*, 34 Ch D. 362; *Re Griffiths* (1917) P. 59

- (c) H Vol 28 p 803
- (d) *Doe v. Brabant*, 3 Bro C C 393; see *Brookman v Smith* L R 6 Exch 303; *Re Graham* (1929) 2 Ch 127, but see *Durga v Raghunandan* 19 C W N 439
- (e) *Brookman v Smith* L. R. 7 Exch 271; see *Hannan v Sims* 2 D G & J 151, (Substitutional gift) J 1308

real intention of the testator that the fulfilment of the exact condition imposed is not strictly insisted upon. Where however there is no such intention present, but, on the contrary, the will shows an intention that the gift over shall not have effect unless, as in the case of a gift on a condition, the very event on which the gift is made contingent be fulfilled with strict exactness, then the above principle can have no application. To do so would be not to construe but to make a will on behalf of the testator. Therefore, the Courts are not authorised in every case of failure of the prior gift in any manner whatsoever to give effect to the ulterior one. This section thus qualifies the operation of the general rule laid down in the last section (a).

In *Underwood v Wing* (b), there was a bequest to the wife absolutely and in case of her death in his lifetime, there was a gift over, and the testator and his wife were drowned at sea and it was impossible to prove who died first, it was held, the gift over failed as the event on which it was made to depend could not be proved to have been fulfilled and there was no general intention that the gift over was to take effect if the gift to the wife were to fail in any manner (c).

131 (S. 118). (1) A bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121, 122, 123, 124, 125, 126, 127, 129 and 130.

Illustrations

(i) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A dies under 18.

(ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.

(iii) A sum of money is bequeathed to A for life, and, after his death, to B, but if B shall then be dead, leaving a son such son is to stand in the place of B. B takes a vested interest in the legacy, subject to be divested if he dies leaving a son in A's lifetime.

(iv) A sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C. A and B die

(a) *Radha v Raneemani*, 33 C. 957, 10 C. W. N. 695; see *Wing v Angrove*, 4 D. C. M. & G. 633 on app. 8 H. L. C. 183.

(b) 4 D. C. M. & J. 633.

(c) *Howard v Howard* 21 Beav. 550, *Gillett v Smith* 22 Ch. D. 236.

before C The gift over cannot take effect but the representative of A takes one half of the money and the representative of B takes the other half

(v) A bequeaths to B the interest of a fund for life and directs the fund to be divided at her death equally among her three children or such of them as shall be living at her death All the children of B die in B's lifetime The bequest over cannot take effect but the interests of the children pass to their representatives

1 **The section** The section applies to the wills of Hindus *etc* See S 28 Transfer of Property Act After dealing with conditions precedent and conditional limitations the Legislature proceeds to deal with conditions subsequent A condition precedent prevents the vesting of an estate till the happening of that condition A condition subsequent as will be seen from this section and the next operates to divest an interest already vested on the breach or non performance of that condition A specified uncertain event on the happening of which the thing bequeathed shall go to another person obviously refers to a condition subsequent as it has the effect of divesting a vested interest (a) A clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person or persons (b)

2 **No substantial difference between the two kinds of conditions** It must be noted that there is no substantial difference in the nature of the two kinds of conditions In fact a condition subsequent in respect of a prior bequest is a condition precedent in respect of the ulterior bequest Thus in illust (i) the death of A before B is a condition subsequent which results in his being divested of the legacy but is a condition precedent to B's getting it But there is a difference in effect or as regards the mode of compliance with the condition (c)

3 **Sub section 2** The second sub section states that a condition subsequent will be valid if it can form a valid condition precedent This again shows that there is no essential difference in the nature of the two conditions A condition subsequent therefore which is illegal (d) or is against public policy (e) or infringes the rule against perpetuity (f) is void and the legacy becomes unconditional So also if a gift over cannot take effect the prior gift becomes absolute (g)

4 **Application of the rule to Hindu wills** It has been laid down in *Soorjeemoney v Dinobundoo* (h) that a gift over by defeating a prior interest upon an event which is to happen if at all immediately on the close of a life in being and in favour of a person born in the testator's lifetime is good under Hindu law Therefore it is quite competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event (i)

- (a) *Chandler v Adm Genl* 85 I C 564 see *Shankar v Manjunath* 74 I C 293
 (b) *Amulya v Kalidas* 32 C 661 669
 (c) See text S note and also note at the head of the chapter
 (d) *Ridgway v Woodhouse* 7 Beav 437
 (e) *Re Beard* (1903) 1 Cl 383
 (f) *Ring v Hardwick* 2 Beav 352, *Jones v Adm Genl* 46 C 445, but see *Re Beard's Trusts* (1904)

- 1 Ch 270
 (g) *Watkins v Weston* 32 L J Ch 395 affd 609
 (h) 9 M I A 123, see *Lalit v Chakkun* 24 C (850), *Dal Mollicahoo v Amooobal* 24 I A 93
 (i) *Aristoromont v Narendra* 16 C 383 PC *Naratchand v Manekchand* 23 Bom L R 450

But for this section an absolute gift but defeasible on the happening of an uncertain event would have remained absolute and the condition would have been void (a).

132 (S. 119). An ulterior bequest of the kind contemplated by section 131 cannot take effect, unless the condition is strictly fulfilled.

Illustrations

(i) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.

(ii) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(iii) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that, if A dies under 18 or marries without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

1. The section. The section applies to the wills of Hindus, etc. See S. 29 Transfer of Property Act. The section lays down that a condition subsequent which will lead to the divesting of a vested interest must be strictly fulfilled. This will appear clear from the observations of the judges in *Harrison v Foreman* (b) and in *Sturges v Pearson* (c). It will also be manifest from a comparison of Illust. (i) to this section with Illust. (ii) of S. 128.

2. Strictly fulfilled. This expression means that "the very event must happen, or the act with all its details must be done, in order to deprive the legatee of his legacy" (d). Thus, where there was a bequest in trust for a niece for life and after her death to be divided equally among all her children and in case there be but one child of the niece at the time of her death, then to go to that only child, and the niece had 13 children three of whom had died in her lifetime, held, "as the event which the testatrix contemplated, namely, that there might be only one child living at the death of her niece, has not happened the vested interest which the children took were not divested by their dying in the lifetime of their mother" (e). Consent of survivors is sufficient in case of a condition precedent but not in case of a condition subsequent (f) and therefore the ulterior gift does not take effect (g). Thus, where a testator gave a legacy on condition that in case any of the legatees married without the consent of the executors there would be a gift over to another, one of the executors died, and the legatee married

(a) *Dhanlaxmi v. Hariprasad*, 45 B 1038.

(b) 5 Ves. 207.

(c) 4 Madd. 411; see note under heading of this chapter.

(d) W. 823 4, 12 Ed.

(e) *Templeman v Warrington*, 13 Sim 267.

(f) Cf. Illust. (i) with S. 128 Illust. (ii).

(g) See *Hervey-Bathurst v Stanley*, 4 Ch. D. 251, 272.

without the consent of the surviving executor, *held*, there was no divesting (a) Ignorance of a condition annexed to a gift is no excuse for not complying with it (b) The law with regard to conditions, therefore, comes to this In case of a condition precedent substantial compliance is sufficient to vest the legacy (S 128) In case of a conditional limitation a gift over takes effect upon the failure of a prior bequest even in a manner not contemplated by the testator (S 129) But a condition subsequent, in order that it may divest a vested interest, must be strictly fulfilled (S 132)

3 Illustration (i) This illustration shows how strictly conditions are construed The reason is that a condition that goes to defeat or determine an interest already vested does not find favour in law and therefore strict compliance is insisted on by the Courts A general condition prohibiting marriage by which a legacy is cut down is void (c) But more modern opinion seems to be that such a condition is only *prima facie* and not *per se* void (d) But a gift until marriage (e), or during widowhood (f), is good as a conditional limitation A condition subsequent in partial restraint of marriage, *e.g.*, requiring consent of named persons in case of marriage, is good at any rate if there be a gift over (g)

4. Illustration (ii). This illustration goes to show that it is sufficient if the condition be complied with at the time of the first marriage (h)

5. Illustration (iii) In *Chauncey v. Graydon* (s) there was a bequest to A to be paid on attaining 21 or marriage, with a proviso that if A should die before 21 or marry without the consent of B, then over, it was held that the marriage of the legatee during minority without consent involved a forfeiture The reason was that the defeasance of the vested interest depended on two conditions, *viz.* death before 21 and marriage without consent, either of which happening the gift over took effect But in case of a condition precedent, *e.g.*, where there is a bequest to A at 21 or upon marriage with consent with a proviso that in case of marriage without consent, then over, it has been held that if the legatee attains 21 and then marries without consent there will be no forfeiture because the legacy vests absolutely on the happening of one or two conditions (j), and the result will be the same even if the legatee attained 21 after marriage without consent (k) If however instead of 'or' there was 'and', the divesting would depend upon two events and if only one happened, then the subsequent gift would fall *e.g.*

- (a) *Peyton v Bury* 2 P. W 626,
Knight v Cameron 14 Ves 389,
Alsable v Rice, 3 Madd 256,
Collett v Collett, 12 Jur N S 180,
 (b) *Asley v Earl of Essex*, 18 Eq 290 297, See S 128 note
 (c) *Morley Rennoldson*, (1895) 1 Ch 447, *Bellairs v Bellairs*, 18 Bq 510
 (d) *Re Hewitt* (1918) 1 Ch 458 (the law is elaborately discussed)
 (e) *Newton v Manden* 2 J & H 356,
Morley v Rennoldson 2 Hare 570,
Re Hewitt (1918) 1 Ch 453
Allen v Jackson 1 Cl D 399 (will marriage of a widower) but see

- Marples v Bainbridge*, 1 Madd 590, *Jones v Jones*, 1 Q B D 279 J 1513 14
 (f) *Re Boddington* 25 Ch D 685
 (g) *Re Whitting's Settlement*, (1905) 1 Ch 96
 (h) *Hutcheson v Hammond*, 3 Bro C C 128, *Crommelin v Crommelin* 3 Ves 227
 (i) 2 Atk 616
 (j) *Deabody v Boycille* 2 P W. 547 W 830 12 Ed
 (k) *Austen v Halsey* 13 Ves 125,
Knight v Cameron 14 Ves 389,
Collett v Collett 12 Jur N S 180 W 831, 12 Ed

a bequest to A for life and after his death to his eldest son, but in case A should 'die under age and without issue, then over, and A had a son the gift over did not take effect. It was not possible to change 'and' into 'or' (a)

6 **Residence** Testators very often enjoin residence as a condition of enjoying a gift and provide that in case of breach of such a condition there will be a gift over. In the *Tagore Case* (b) the following interpretation has been put upon such a condition — 'Where in a condition of residence no manner or period of residence is prescribed, but residence simply and without definition exclusive residence is not supposed to be meant, and that in such cases the occasional use of the house and keeping an establishment in it, with the intention of again using it as a residence is a sufficient compliance with the condition' In order that there may be breach of the condition of residence residence elsewhere must be voluntary. Forceful removal of the legatee with the help of the police is a plain case of duress and therefore involves no breach of the condition, for the legatee in such cases does not continue to live away as a free agent (c). A condition requiring a widow to reside in a particular place is valid and binding and not void for uncertainty or unreasonableness (d). On breach of such a condition there will be forfeiture or divesting (e). There will be no breach of the condition if from a just cause the legatee chooses to reside elsewhere. A testator cannot by such a clause deprive her widow of her maintenance (f). A right of residence includes the right to occupy with wife and family (g).

7. **Assumption of names** In *Astley v Earl of Essex* (h) an estate was devised in strict settlement with a proviso that in case any person should fail to assume the testator's name and arms within 12 months after coming into possession, then a gift over to the next in remainder, the next remainder man being in India and being ignorant of his rights under the will did not comply with the condition held there was forfeiture.

8 **Die without issue** Where there are limitations over in case of legatees living at a certain period but dying without issue (or leaving issue), then the condition applies only to such of the legatees as are living at the period (i).

Original bequest not affected by invalidity of second 133 (S 120) If the ulterior bequest be not valid the original bequest is not affected by it

- (a) *Malcolm v Malcolm* 21 Beav 225
 (b) 9 B L R. 377, see *Re Mohr* 25 Ch D 605
 (c) *Tincourt v Krishna Bhabini* 20 C 15 *Clavering v Ellison* 7 H L C. 707 3 Dr. 451 reld to see also *Tagore Case* 9 B L R 377.
 (d) *Bhabatini v Peary Lall* 24 C. 46 1 C. W N 578, *Tagore Case* 14 B L R. 60, *Mulji v Bai Ujam* 13 B 218, *Giranna v Honama*, 15 B 236
 (e) See also *Shyama v Sarup* 17 C.

- W N 39
 (f) *Promotha v Nagendrabala* 8 C. L J 48 12 C W N 608, see discussion in *Raja Pirthee Sing v Rani Rajkooer* 12 B L R. 238
 (g) *Pultibal v Sorabji* 76 I C 996 25 Bom L. R 1099
 (h) 18 Eq 290 see *Re Cornwallis* 32 Ch D 388
 (i) *Homes v Herring* 1 M C I & Y 295, see *Weddell v Mundy* 6 Ves. 341. *Re Roberts*, (1903) 2 Ch 200

Illustrations

(i) An estate is bequeathed to A for his life with condition superadded that, if he shall not on a given day walk 100 miles in an hour the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will

(ii) An estate is bequeathed to A for her life and, if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will

(iii) An estate is bequeathed to A for her life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 105, and A is entitled to the estate during his life

The section The section applies to the wills of Hindus, etc. See s. 30 Transfer of Property Act

The rule. An absolute interest is not to be taken away by a gift over, unless the gift over may itself take effect (a). As has been said in *Ahettemohan v Gunga Narain* (b) specific trusts or specific estates good in themselves are not invalidated by a subsequent invalid disposition of the residue or remainder. This is so, however, where the original gifts are not intended to be defeated unless and until the gifts over take effect (c). It has been pointed out in *Egerton v Brownlow* (d) that if a condition precedent be void on the ground of impossibility, impolicy, or illegality, the consequence is that the gift also fails, but where a gift good in itself is followed by an unlawful or repugnant condition or qualification in a distinct clause, the gift is upheld and the condition or qualification which alone is obnoxious, is rejected. Therefore, where a condition subsequent is impossible, impolitic or illegal, the condition is void, but the original gift is not affected. This means not only that the original gift will not fail with the failure of the ulterior bequest but that the original bequest will not be altered or enlarged in consequence (e).

Where both bequests fail. Where there is no intention that the original gift will be defeated only on the gift over taking effect, e.g., where under the terms of a will the gift over takes effect on the happening of a certain event, then the original gift fails on the happening of that event (see S. 136), irrespective of the fact as to whether the ulterior gift takes effect or not, the original gift fails under the terms of the will and the failure of the ulterior bequest will not save the original bequest (f).

- (a) *Green v. Harcey*, 1 Hare 426, Re Beard (1908) 1 Ch 383, Re Sandbrook, (1912) 2 Ch 471 W 8167 12 Ed
(b) 4 C. W. N. 671, 677
(c) *Smither v. Willock* 9 Ves 233, *Salisbury v. Pelly* 3 Hare 86
(d) 4 H. L. C. 1, 1812, see also *Lawther v. Cavendish* 1 Eden 99, *Walker v. Walker*, 2 D. F. & J.

- 255 J 1444
(e) *Tagore Case* 9 B. L. R. 377, *Kristoromani v. Narendro* 16 1 A 29, 16 C 333, *Krishnarao v. Benabai* 20 B 571, 595
(f) *Doe v. Lyre* 5 C. B. 713 O Mahoney v. Burdett, L. R. 7 H. L. 385 437, *Hunt v. Hunt*, 21 Ch D 278

Cases Where there is a gift of an absolute interest in some property coupled with words intended to restrict that interest and the restriction is not effectual because it infringes the rule against perpetuity it has been held that the original gift of an absolute interest is good (a) Where the ulterior gifts are invalid the original bequest has been held not to be affected but to remain absolute (b) Similarly where the gift over cannot take effect, because all the conditions are not strictly fulfilled the original gift is not affected (c) Where the ultimate gifts are void for uncertainty the other intermediate gifts have been held to be valid (d) Where it is incapable of ascertainment at any moment of time whether the limitation has or has not taken effect the ulterior gift is bad but the original bequest is not affected (e) So also gift over which is too remote and void cannot defeat the vested interests previously given (f)

Repugnant conditions These are qualifications imposed upon original gifts restricting or abridging the right of ownership or enjoyment The two are thus incompatible and cannot stand together The result is 'that where there is a gift with a condition inconsistent with or repugnant to such gift the condition is wholly void (g) There are a large number of cases which lay down that if an estate in fee simple be given by a will or other instrument with a proviso which is in law a condition subsequent defeating the estate on alienation or bankruptcy or refusing to assume a certain name or on dying without heirs etc, the condition is void but the prior gift is not affected (h) For inconsistent clauses in a will see S 88

Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen or not happen

134 (S 121) A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen

Illustrations

(i) An estate is bequeathed to A for his life, with a proviso that in case he shall cut down a certain wood the bequest shall cease to have any effect A cuts down the wood He loses his life interest in the estate

(ii) An estate is bequeathed to A provided that if he marries under the age of 25 without the consent of the executors named in the will the estate shall cease to belong to him A marries under 25 without the consent of the executors The estate ceases to belong to him

- (a) *Ring v Hardwick* 2 Beav 352,
Anand Rao v Adm Genl 20 B
450 see also *Watkins v Weston*
32 L J Ch 396 on app. 609
Bradford v Young 29 Ch D 617,
Re Wilcock (1898) 1 Ch 95,
Re Wood (1902) 2 Ch 542
Webster v Parr 26 Beav 236
(b) *Ridgway v Woodhouse* 7 Beav
437
(c) *Gaton v Barker* 2 Coll. 124
(d) *Shyama v Sarup* 17 C. W. N
39 *Claxton v Ellison* 7 H L
C. 707

- (e) *Re Viscount Exmouth* 23 Ch D,
158
(f) *Blease v Burgh* 2 Beav 221
(g) *Bradley v Peixoto* 3 Ves. 325
appd in *Re Dugdale* 38 Ch D 176
(h) *Burg v Lord Stratford* 5 Beav
553 *Hunt-Foulston v Funder* 3
Ch. D 285 *Shaw v Ford* 7 Ch
D 669 *Re Machu* 21 Ch D
838 *Musgrave v Brooke* 26 Ch
D 792 *Re Dugdale* 38 Ch D
176, *Re Smith* (1916) 1 Ch. 369
see *Tagore case*, 9 B. L. R. 377
and also S 138

(iii) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases

(iv) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will

(v) A fund is bequeathed to A for life, and, after his death, to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her shall cease to have any effect. B becomes a nun in the lifetime of A. She thereby loses her contingent interest in the fund

The section The section applies to the wills of Hindus, *etc*. See S 31 Transfer of Property Act. The section deals with the forfeiture of a legacy which is distinct from a bequest with a gift over though both may be made dependent on the same event or condition

In terrorem. In England it has been held that a condition subsequent in case of a gift of personalty operates merely *in terrorem*, unless there is a provision that upon breach of the condition the legacy will go over to another person (a). But the law as regards conditions *in terrorem* do not prevail in this country (b). The Act says that a condition subsequent is not to be considered merely *in terrorem* even if unaccompanied by a gift over

Cases. Where there was a gift for life with a clause of forfeiture on creating an encumbrance, the condition was held good (c). Where trustees were directed to pay an annuity to A, and it was provided that should A in any way intermeddle or interfere with the management of the testator's estate, or attempt to do so, he should lose his annuity, and A brought a frivolous suit with a view to get the management out of the hands of the trustees, *held*, A had incurred forfeiture, but there would be no forfeiture where there was good cause for litigation (d). Failure to claim a legacy in the manner proscribed has caused forfeiture (e). A condition in a will requiring residence in the family dwelling-house or in some holy place and in default to lose all rights under the will was held good, and the legatee having resided elsewhere, because she quarrelled with people living in the same house, *held*, forfeiture was incurred (f). Breach of a condition for a just cause (g) or brought about by duress (h) will not effect forfeiture. In *Bhoobun Mohini v Hurrish Chunder* (i) there was an absolute gift to the donor's sister coupled with words which were construed to make the absolute estate given defeasible in the event of a failure of issue

(a) *Loyd v Spillett*, 3 P W 344

(b) See observations of Law Commissioners cited in note under this chapter

(c) *Hunt v Hunt*, 21 Ch D 278

(d) *Adams v Adams* (1892) 1 Ch 369, see *Re Williams* (1912) 1 Ch 399

(e) *Tulk v Houlditch* 1 V & B 248, *Henkes v Baldwin* 9 Sim 355, *Re Hartley*, 34 Ch D 742

(f) *Bhabatarini v Peary Lall*, 24 C. 646, 1 C W N 578, *Shyama v Noka*, 141 C. 703, see *Girdanna v Honama* 15 B 236

(g) *Mulji v Ujain* 18 B 218

(h) *Tincourt v Krishna Bhabini*, 20 C. 15

(i) 51 A 138, 4 C 23 approved in *Kishoromoni v Narendra*, 16 C. 383 P. C.

living at the time of her death, in which event the estate was to revert to the donor and his heirs, it was held there was nothing in such a condition repugnant to Hindu law, and as the event did not occur, the sister's estate became indefeasible. A widow's refusal to comply with a direction to adopt is no ground of forfeiture as regards her rights of inheritance (a)

135 (S. 122). In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by section 120.

Such condition must not be invalid under section 120.

The section. The section applies to wills of Hindus, etc. See S 32 Transfer of Property Act. Commentators are at a loss to explain the reference to S. 120 and it has been suggested that the figure, 120, is a misprint. An explanation, however, may be hazarded. S 120 deals with the vesting of a legacy contingent upon a specified uncertain event. Now it is a condition precedent that makes a legacy contingent upon a specified uncertain event. This section declares that any condition that will make a legacy contingent may also be imposed as a condition which will make a bequest cease to have effect; in other words, the same condition may be made a condition precedent to the vesting of a legacy or a condition leading to the divesting of a legacy and the same rules will be applied to determine the validity of the two classes of conditions (b). It is only a valid condition that can effect the divesting of a gift. Thus, a condition divesting a gift of a heritable estate on alienation or on general failure of issue being void does not affect the gift (c). In cases providing for forfeiture of the original estate with a gift over on the happening of some event, the clause of forfeiture will take effect even if the gift over fails (d). This is however a question of construction of the testator's intention (e).

136 (S. 123). Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject matter to go over

- (a) *Uma v. Surobinee*, 7 C. 288. See *Gulbaji v. Rusomji*, 49 B 478.
 (b) See notes under heading of this chapter. See *Pullihal v. Sorabji*, 25, Bom L. R. 1099, 1100; 76 I C 996
 (c) *Lalit v. Chukkun*, 24 C. 834, 1 C. W. N. 387. See cases cited under

- S 123.
 (d) *Hunt v. Hunt*, 21 Ch. D. 278
 (e) *Rockford v. Hackman*, 9 Hare 475, 491; per contra, *Hodgson v. Holford* 11 Ch. D. 959. See cases cited under S. 123

(iii) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(iv) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.

(v) A fund is bequeathed to A for life, and, after his death, to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her shall cease to have any effect. B becomes a nun in the lifetime of A. She thereby loses her contingent interest in the fund.

The section. The section applies to the wills of Hindus, etc. See S. 21 Transfer of Property Act. The section deals with the forfeiture of a legacy which is distinct from a bequest with a gift over though both may be made dependent on the same event or condition.

In *terrorem*. In England it has been held that a condition subsequent in case of a gift of personally operates merely *in terrorem*, unless there is a provision that upon breach of the condition the legacy will go over to another person (a). But the law as regards conditions *in terrorem* do not prevail in this country (b). The Act says that a condition subsequent is not to be construed merely *in terrorem* even if unaccompanied by a gift over.

Cases. Where there was a gift for life with a clause of forfeiture on creating an encumbrance, the condition was held good (c). Where trustees were directed to pay an annuity to A, and it was provided that should A in any way interfere with the management of the testator's estate, or attempt to do so, he should lose his annuity, and A brought a divorce suit with a view to get the management out of the hands of the trustees, *inter alia* A had incurred forfeiture, but there would be no forfeiture where there was good cause for litigation (d). Failure to claim a legacy in the manner prescribed has caused forfeiture (e). A condition in a will requiring residence in the family dwelling-house or in some holy place and in default to lose all rights under the will was held good, and the legatee having resided elsewhere, because she quarrelled with people living in the same house, *inter alia* forfeiture was incurred (f). Breach of a condition for a fact came (g) or brought about by dress (h) will not effect forfeiture. In *Shroffs Malini v. Harish Chander* (i) there was an absolute gift to the donor's sister coupled with words which were construed to make the absolute estate given defeasible in the event of a failure of issue

(a) *Lord v. Sefton*, 3 P. W. 344.

(b) See observations of Law Commission cited in note under this chapter.

(c) *Hart v. Hart*, 21 Ch. D. 278.

(d) *Slone v. Slone*, (1892) 1 Ch. 369; see *Re Williams* (1917) 1 Ch. 320.

(e) *Tait v. Balfour*, IV. & B. 244; *Hester v. Hester*, 9 S. M. 355; *Re Hart*, 34 Ch. D. 70.

(f) *Shroffs v. Frey*, L.R. 23 C. 646; 1 C. W. N. 575; *Syams v. Nair*, 14 L.C. 708, see *Grange v. Hume*, 15 B. 26.

(g) *Mell v. Uden*, 18 B. 211.

(h) *Thorne v. Korine Shroff*, 20 C. 15.

(i) 5 L. A. 133, 4 C. 23 approved in *Keshavnani v. Nandan*, 10 C. 133 P. C.

living at the time of her death, in which event the estate was to revert to the donor and his heirs, it was held there was nothing in such a condition repugnant to Hindu law, and as the event did not occur, the sister's estate became indefeasible. A widow's refusal to comply with a direction to adopt is no ground of forfeiture as regards her rights of inheritance (a)

135 (S. 122). In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by section 120.

Such condition must not be invalid under section 120.

The section. The section applies to wills of Hindus, *etc.* See S 32 Transfer of Property Act. Commentators are at a loss to explain the reference to S. 120 and it has been suggested that the figure, 120, is a misprint. An explanation, however, may be hazarded. S 120 deals with the vesting of a legacy contingent upon a specified uncertain event. Now it is a condition precedent that makes a legacy contingent upon a specified uncertain event. This section declares that any condition that will make a legacy contingent may also be imposed as a condition which will make a bequest cease to have effect; in other words, the same condition may be made a condition precedent to the vesting of a legacy or a condition leading to the divesting of a legacy and the same rules will be applied to determine the validity of the two classes of conditions (b). It is only a valid condition that can effect the divesting of a gift. Thus, a condition divesting a gift of a heritable estate on alienation or on general failure of issue being void does not affect the gift (c). In cases providing for forfeiture of the original estate with a gift over on the happening of some event, the clause of forfeiture will take effect even if the gift over fails (d). This is however a question of construction of the testator's intention (e).

136 (S. 123). Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non performance of which subject matter to go over

- (a) *Uma v. Sourabhee*, 7 C. 288. See *Gulbaji v. Rastomji*, 49 B 478.
 (b) See notes under heading of this chapter. See *Pullbal v. Sorabji*, 25, Bom L. R. 1099, 1100; 76 I. C. 996.
 (c) *Lalit v. Chakkan*, 24 C. 834, 1 C. W. N. 387. See cases cited under

- S 123
 (d) *Hunt v. Hunt*, 21 Ch. D. 278.
 (e) *Rockford v. Hackman*, 9 Hare 475, 481, per contra, *Hodgson v. Holford*, 11 Ch. D. 959. See cases cited under S. 123.

Illustrations.

(i) A bequest is made to A, with a proviso that, unless he enters the Army, the legacy shall go over to B. A takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(ii) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect.

The section. The section applies to the wills of Hindus, etc. See S 33 Transfer of Property Act.

The rule. Where no time limit is prescribed by the testator for the performance of a condition the general rule is it must be done within a reasonable time (a). In some cases, however, a condition, e g, a gift on condition of a legatee assuming a particular name, is construed as a condition subsequent and therefore is to be fulfilled as soon as the legatee comes into possession (b).

Cases. Where a testator made a devise in favour of his nephew subject to the proviso that if the nephew did not marry the niece specified, then over, the nephew in the lifetime of the testator and with his assent married another, *held*, the gift over took effect. The fact that there was still the possibility for the nephew to survive his wife and marry the person named was held to give no right or interest to the legatee in the legacy. It was a mere expectation of a future interest (c). In *Shyama v. Sarup* (d), there was a contingent gift in favour of N provided he lived in the testator's ancestral dwelling house, after the testator's death N joined with the testator's widow in conveying the house to a stranger, *held*, by that act, by reason of the forfeiture clause, N was deprived of the interest given by the will. If however the testator renders by any act of his performance of the condition impossible, performance is excused (e), so also where performance is rendered impossible by any order of Court (f).

137 (S. 124). Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-

Performance of condition, precedent or subsequent within specified time. Further time in case of fraud

matter of the bequest is to go over to another

person or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time

(a) *Dacles v Lowndes* 2 Scott. 71
(b) *Re Greenwood*, (1933) 1 Ch 749
(c) *Dacles v Angel* 4 D. F. & J 524; other rulings were to the contrary, see *Randal v Payne*, 1 Bro C. C. 55; see also *Lowe v Manners*, 5 B & Ald. 917.

(d) 17 C. W. N 39, 14 1 C. 709
(e) *Darley v Langworthy* 3 Bro P. C. 359; *Wedgwood v Denton*, 12 Eq 290
(f) *Re Conington's Will*, 6 Jur, N S. 992

shall be allowed as shall be requisite to make up for the delay caused by such fraud.

1. The section. The section applies to the wills of Hindus *etc* See S 34 Transfer of Property Act But the words 'of a person who would be directly benefited by the non-fulfilment of the condition' occurring in that Act have been dropped in this section, an omission which seems to be intentional (a) This section differs from the preceding one by the fact that it contemplates a case where the testator has fixed a time limit for compliance with the condition

2. The rule. The rule laid down in the section states that where a time limit has been prescribed by the testator, it must be strictly complied with in order to prevent a forfeiture or gift over from taking effect (b) Thus failure to comply with the condition of giving a release within the time stipulated in the will was held to involve forfeiture (c) In *Brooke v Garrod* (d) a legatee lost the right of preemption conferred on him by the will because of failure by him to pay the purchase money within the time specified by the testator Wood V—C observed that such conditions were to be complied with strictly, being analogous to a case of vendor and purchaser where time was made the essence of the contract Relief might have been obtained if non compliance with the condition was due to fraud.

3 Mode of reckoning time In *Lester v Garland*, (e), there was a condition of giving a security within a specified time A security was granted, but if the day of the testator's death was reckoned it was out of time, if not, was within time, the day of the testator's death was excluded in that case though it was observed that there was no general rule to that effect, but the rule, *viz*, that the day of the testator's death is to be excluded, has been recognised in *Gorst v Lowndes* (f)

4 Illness or ignorance of condition. This is no ground or excuse for non-compliance with the testator's directions (g) The rule is stated to be that "neither ignorance nor neglect, on the part of the executor to inform the legatee, can excuse him from not complying with the direction so as to entitle him to the gift" (h) The executor is not bound to inform the legatee unless the legatee be also the heir (i)

5. Relief against forfeiture Where breach of a condition was brought about by duress there would be no forfeiture (j) Courts in England have granted relief against forfeiture where adequate compensation could be rendered (k).

(a) *Tincourt v Krishna*, 20 C. 15
 (b) *Dawson v Dawson* 8 Sim 341
 (c) *Simpson v Vickers*, 14 Ves 346
 (d) 3 K & J 608, on app 2 D G & J 62
 (e) 15 Ves 248
 (f) 11 Sim 434
 (g) *Burgess v. Robinson* 3 Mer 7.
Carter v Carter 3 K. & J 617.
Hawkes v Baldwin, 9 Sim 355,
 J 1454 sq 7 Ed

(h) *Re Hodge's Legacy*, 16 Eq 92,
Astley v Earl of Essex, 18 Eq 290
Re Lewis (1904) 2 Ch 656
 (i) *Doe d Taylor v Crisp*, 8 Ad & E. 779, see *Re Mackay*, (1906) 1 Ch 25.
 (j) *Tincourt v Krishna* 20 C 15
 (k) *Barnardiston v Fane* 2 Vern. 366,
Palne v Hyde 4 Bear 468, *Re Dickson's Trusts*, 1 Sim N S 37 J 1456. 7 Ed

CHAPTER XII.

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

138 (S. 125). Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person

Illustration.

A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A or to place A in any business A chooses to receive the legacy in money. He is entitled to do so

1. The section. The section applies to the wills of Hindus, *etc* Cf, Ss 10 and 11 Transfer of Property Act The section is based on a rule of commonsense which is of universal application, *viz.* an absolute gift cannot be fettered by a subsequent condition (a) The two cannot stand together Such a proviso will be void for repugnancy (b) The rule is not peculiar to the case of gifts by wills Thus, an agreement among coparceners not to divide certain property has been held to be invalid (c), but not if the agreement be for a limited period (d) Law favours the free circulation of property, so it will not allow a restrictive condition to be imposed on an absolute gift If, therefore there be an absolute gift but coupled with it there be a restraint on the exercise of any right incident thereto, then the gift is good but the restraint is bad (e) The rule applies where property is made over to trustees for the benefit of legatees with directions as to the modes of enjoyment (f) This section therefore embodies two rules

2 Rule (1) "Where there is a general intention to create a valid estate and a particular intention to deprive such estate of its legal incidents effect will be given to the general intention, and the particular intention will be disregarded" But where the general intention is not discernible in the will, in other words, an effective or valid gift has not been made, then the whole will shall fail (g) Where therefore there is an absolute gift or transfer of an estate, it is not competent to the grantor or testator to sever from the right of property incidents which the law inseparably annexes to it and thereby to abrogate the law by private

- (a) *Lloyd v Webb*, 24 C 44. See *Tripurari v Jagat* 40 I A 37
 (b) *Parlington's Case*, 10 Rep 35a, 38b see *Jehangir v Kalkhuru*, 39 B 296 300 I
 (c) *Ramlinga v Virupakshi*, 7 B 539
 (d) *Srmohan v Macgregor* 28 C 769, 786
 (e) See *Krishna v Vythlnatha* 18 M 252. *Motoondo v Gonesh* 1 C 104; *Ranceemoney v Premmoney*,

- 33 C 957 1033. *Lalit v Chukkun* 24 C 834, 849. *Rajamoyee v Troylukho* 29 C 260 277. *Navalchand v Maneckchand* 23 Bom L R 450
 (f) *Re Johnston* (1894) 3 Ch 204. *Re Smith* 1928 Ch 915
 (g) *Shookmoy v Monohari* 12 I A 103 on app from 7 C 269 279. *Poorendra v Hemangini* 36 C 75, 12 C W. N 1002

agreement (a). Where, however, there is no absolute gift of the present interest of the testator then he may create an intermediate interest for a specific purpose and such a gift will not be an infringement of the rule. Thus, where a testator directed that the intermediate interest for 13 years in certain properties was not to go to his son but to be dealt with by the trustees in carrying out certain specific trusts, *held*, the gift to the son during the period of 13 years was a limited one, therefore the provision was valid (b). If the intermediate interest fail, the main gift takes effect (c). In one sense, it will be seen, the principles laid down in the section form an exception to the rule that the legatee takes what is given to him (d). An absolute gift is liable for the debts of the testator and the decree holder can seize and sell the property in satisfaction of the decree against the legal representatives of the deceased legatee (e).

3. Rule (ii). A direction by a testator as to the mode of application of a legacy with a view to benefit a legatee is not binding on the latter. The reason obviously is that the gift if actually procured for the legatee can be undone by him the next moment. The principle has been thus stated "If the main object of a gift is to benefit the person who is to take and no other person is interested in the bequest, in such a case, if the gift cannot be applied to the purpose specified (see next section), or if the legatee prefers to have it otherwise applied, he may ask the Court to give him the property absolutely. On the other hand, if there is any other purpose, distinctly and clearly expressed, independent of the object of benefiting the legatee, and beyond the mere intimation of a wish as to the mode in which the benefit should be conferred, there it is settled the principle does not apply" (f). In the latter case, the donee is entitled to the gift only to the extent that is necessary for the fulfilment of the object (g) and if the object cannot be accomplished the gift fails (h). Therefore in the case of an absolute bequest for the benefit of a legatee, any direction as to its application or enjoyment will be void (i). As to how a provision for maintenance is to be understood and applied, see *Narayan v. Adm Genl* (j).

4 Absolutely. This word, absolutely, generally creates an absolute interest, but in a certain context may imply a limited interest (k), thus it may not confer unlimited power of disposition (l). In case of gifts to women in this country words of inheritance do not always confer an absolute interest (m). The importance

- (a) *Anantafirtha v. Nagamuthu*, 4 M. 200; *Subramaniam v. Subramaniam* 4 M. 124; *Lala Ramjewan v. Dal Koer*, 24 C. 406, 412; *Bal Mamubai v. Moraji*, 15 B. 443, 449; *Naralchand v. Manekchand*, 23 Bom. L. R. 450.
 (b) *Prasulla v. Jogendra*, 9 C. W. N. 528, see *Subramaniam v. Subramaniam* 4 M. 124; *Vallukhdas v. Thacker Gordhandas*, 14 B. 360.
 (c) *Hancock v. Watson* 1902 A. C. 14.
 (d) *Hartlin v. Masterman* (1894) 2 Ch. 184, 196; cited in *Lloyd v. West*, 24 C. 44.
 (e) *Golinda v. Benode*, 12 C. W. N. 44.

- (f) *Re Skinner's Trusts*, 1 J. & H. 105, following *Lassence v. Tlemay*, 1 Mac. & G. 551, see *Adm. Genl v. Apcar* 3 C. 553.
 (g) *Re Black*, (1907) 1 I. R. 496; *Milner v. Milner*, 1 Ves. Sen. 106.
 (h) *Re De Crespigny*, 1886 W. N. 24.
 (i) *Bal Bapji v. Jamnadas*, 22 B. 774; *Lloyd v. West* 24 C. 44.
 (j) 21 C. 683, 692 sq., see *Natha v. Dhankajit*, 23 B. 1, 10, 11.
 (k) *Adm. Genl v. Hermusji*, 29 B. 375, 378, 380 sq.
 (l) *Comptons v. Fleming Henderby*, 9 C. W. N. 20711.
 (m) *Dharwad Kanta v. Saka*, C. 1069.

of the word lies in the fact that the section will apply when the gift is absolute and there is added to it a direction as regards its application or enjoyment. Then the direction is regarded as nothing more than a motive for the gift (a). It will not have the effect of restricting the absolute gift or any of its incidents (b). If the gift be not absolute the direction may create a trust or be construed as a condition or the gift may fail for uncertainty (c).

5 Absolute restraint of alienation. A condition against alienation is void (d) provided it is attached to a gift which is absolute (e). A prohibition of transfer by sale or gift is opposed to the policy of the law and must be disregarded as repugnant to the gift (f). Such a restriction has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant. The principle has been applied to all secular estates created even though the motive be religious (g). A restriction of a particular mode of alienation is bad (h). Restraint against alienation for a limited period is void (i). A condition to sell to one individual only is bad (j) because the power of alienation is substantially taken away (k). Even in case of a life estate a restraint against alienation is bad (l).

A condition against alienation will be given effect to where the gift does not become vested in possession e.g. where the interest is yet contingent or reversionary (m). It may also be mentioned that if a will contains provisions which are separable and some of them are invalid because they impose restrictions on alienation and seek to create a perpetuity then they will not affect the valid dispositions (n). Thus attempts to create an estate of inheritance unknown to Hindu law by restricting the right of alienation is void under that law and the first taker gets an estate for life only (o). Where some terms of a will apparently give an absolute interest but subsequent provisions show that only a life interest was intended to be

- (a) *Mackell v Mackell* 14 Eq 49
see *Yethirajulu v Mukunthu* 28 M 363
- (b) *Navatchand v Maneckchand* 23 Bom L R 450
- (c) H. Vol. 28 p. 778 see *Sica Rau v Villa* 21 M 425 *Vallabhdas v Thacker* 14 B 369
- (d) *Ca. Lin* 223 a 360
- (e) *Kedat v Goya* 52 C L J 165 129 I C 846
- (f) *Shookmoy v Monohari* 12 I A 103 11 C. 684 7 C. 269 282
Hemangni v Cabin 8 C 789
602 Chundi v Sidheswari 15 I A 149 16 C 71 80 *Jagobandhu v Dwarka* 23 C. 446 *Lalit v Chukkun* 24 I A 76 24 C. 834
Refamoyee v Troylukho 29 C. 260 *Adm Genl v Money* 15 M 448 472 *Sica Rau v Villa* 21 M 425 *Kanna v Chellathammal* 10 M L J 203
Yethirajulu v Mukunthu 28 M 363 15 M. L. J. 299 *Tagore Case* 9 B L R. 377
- (g) *Ananthathirthe v Nagamuthu* 4 M.

- 200
- (h) *Hood v Oglander* 24 Bear 513
Willis v Hscox 4 My & Cr 197 (prohibition of mortgage); see *Re Rother* 26 Ch D 801 (comments on *Re Macleay* 20 Eq 189)
- (i) *K Subramaniam v Subramaniam* 4 M 124 *Re Rother* 26 Ch D 801 referred to in *Re Dugdale* 38 Ch D 176 see *Re Wheeler's Trusts* (1899) 2 Ch 717 (case of a married woman holding separate estate with restraint on anticipation)
- (j) *Muschamp v Bluel* Bidg 137
- (k) *Re Macleay* 20 Eq 186.
- (l) *Brandon v Robinson* 18 Ves 479
- (m) *Re Porter* (1892) 3 Ch 481
Corbett v Corbett 14 P D 7 12;
Pearson v Dolman 3 Eq 315 but see *Re Spence* 30 Ch D 183
- (n) *Rat Kishori v Debend a* 15 I A 37 15 C. 409 sold in *Rameshwar v Lachmi* 31 C. 111 7 C. W. N 638
- (o) *Tagore v Tagore* 9 B L R. 377
Tarakeshwar v Soohi 10 I A 51, 9 C. 952.

given, then only a life estate will be intended to be conferred (a) A total restriction of alienation being bad a gift over upon an attempt to alienate an absolute interest previously given is void as a condition (b) In *re Dugdale* (c) the law is elaborately discussed and thus laid down — The general rule is that a defeasance either by a condition or by a conditional limitation or executory devise cannot be well limited to take effect in derogation not merely of the right of alienation but of any of the natural incidents of the estate which it is intended to divest. A gift over if the legatee dies intestate or otherwise without disposing of the property (d) or without issue (e) is void But a gift over in case the previous gift cannot take effect in law is good (f), so also if the previous gift be not absolute but limited, a gift over upon an event will be good as a conditional limitation (g)

Partial restraint is not necessarily void (h) This has been allowed on the ground of public policy omitting altogether all considerations of repugnancy (i) A restraint of alienation except to a particular class of individuals is good (j)

6 Applied or enjoyed in a particular manner A restriction on the mode of the legatee's enjoyment with a view to secure certain objects for his benefit is void and the absolute gift prevails (k) Thus a legatee has been held entitled to receive the fund where the gift has been for the advancement of the legatee in business (l) or his maintenance and education (m) for purchasing a commission in the army (n) for printing a book (o) for binding him to be an apprentice (p) for enabling him to take holy orders (q) Where a legacy was given to be laid out in planting trees on an estate of which the testator was the tenant for life held it was for benefit of the owners of the estate and belonged to them absolutely (r)

7 Postponement of enjoyment An attempt to postpone enjoyment in possession is bad (s) Where an absolute interest is given but enjoyment is deferred for a few years the restriction is void (t) The principle has been thus stated — The principle of this Court has always been to recognise the right of

- (a) *Somasundara v Ganga* 28 M 386. This depends on the construction of the testator's intention as expressed in the will See *Amarendra v Suradhani* 14 C W N 458, *Authipumam v Appasawmi* 20 M L J 99
- (b) *Bradley v Peixoto* 3 Ves 324
Holmes v Gordon 8 D M & G 152, *Shaw Ford* 7 Ch D 669
Corbett v Corbett 14 P D 7
- (c) 39 Ch D 176 see also *Metcalfe v Metcalfe* 43 Ch D 633
- (d) *Holmes v Gordon* 8 D M & G 152 *Re Dixon*, 2 Ch. 458, *Re Hanbury* (1904) 1 Ch 405
- (e) *Re Parry and Daggs*, 31 Ch D 130
- (f) *Re Crawshaw* 43 Ch D 615
- (g) *Brandon v Robinson*, 18 Ves 429, *Rochford v Hackman* 2 Hare 475
Re Morris 39 Ch D 116.
- (h) *Co Litt* 361

- (i) *Re Rosher* 26 Ch D 801 813
- (j) *Daniel v Ubley Jones* 137 *Attwater v Attwater* 18 Beav 330, *Re Macleay* 20 Eq 186 commented in *Re Rosher* 26 Ch D 801 814
See *Lloyd v Webb* 24 C. 44, *K Subramaniam v T Subramaniam* 4 M 124
- (k) *Adm Genl v Apar* 3 C 553
- (l) *Cope v Wilmot* Amb 704
- (m) *Webb v Kelly* 9 Sim 472
- (n) *Leach v Kilmorey* Turn & R 207
- (o) *Re Skinner's Trusts* 1 J & H 105
- (p) *Barlow v Grant* 1 Vern 255
- (q) *Barton v Gooke* 5 Ves 561
- (r) *Re Bowles* (1896) 1 Ch 507
- (s) *Krishna v Panchuram* 17 C 272
276 *Cally Nath v Chunder Nath* 8 C. 378 387
- (t) *Lloyd v Webb* 24 C. 44
English cases discussed *Pulfrich v Sorabji* 25 Bom L. R. 1

all persons who attain the age of 21 to enter upon the absolute use and enjoyment of the property given to them by will notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age —unless during the interval the property is given for the benefit of another (a) But where a limited interest is given for a definite period on the expiry of which an absolute interest will vest in the legatee the restrictions during that period will be good and not in infringement of the rule laid down in this section (b)

8 Other restrictions A direction of any kind inconsistent with the gift will be void (c) Similarly conditions on gift of an absolute estate in land such as that the land is to be let thereafter at a definite rent (d) or be cultivated in a particular manner (e), or on bankruptcy (f) or requiring the devisee to pay a sum of money out of the sale proceeds in case he sells the land (g) or to use the legacy in good works (h) or to the effect that the legatee will not be liable for the legatee's debts (i) are void The direction will be void not only when it is repugnant to an absolute gift but also where the purpose has been accomplished or becomes incapable of execution (S 137) or can be fulfilled with a smaller amount (unless there is a gift over of the surplus) (j) The legatee will be entitled in spite of the injunction of the testator to the contrary (k) Even if the direction be to hold the money in trust it does not invariably create a trust (l) or even if the benefit be intended for a third person (m)

9 Partition or division A direction postponing partition or restraining division till all the legatees attain majority is valid (n) An absolute gift cannot be made whether by will or by deed controlling the mode of enjoyment in respect of the right of partition (o)

10 Donee dead or not named On the death of the donee his representative will be entitled (p) The executors are not bound to see to the application of the fund (q) The principle laid down in the section has been applied even where the donee is not named the persons entitled will be the persons intended to be benefited (r)

- (a) *Gosling v Gosling* John 265 275
 cited in *Goswami v Rivett Carnac*
 13 B 463 *Husenbhoy v Ahmedbhoy*
 26 B 319 *Raneemoney v Prem*
money 9 C W N 1033
Bramamayl v Joges 8 B L R
 400
- (b) *Prasulla v Jogendra* 1 C L J
 605 9 C W N 528
- (c) *Bai Bapi v Jamnadas* 22 B 774
Adm Genl v Apcar 3 C 553
Re Couturier (1907) 1 Ch 410
Re Johnston (1894) 3 Ch 204
- (d) *All Genl v Greenhill* 33 Bear
 193
- (e) *Brown v Burdett* 12 Ch D 667
- (f) *Re Nachu* 21 Ch D 838, *Re*
Dagdale 35 Ch D 176
- (g) *Re Elliott* (1896) 2 Ch 353
- (h) *Bai Bapi v Jamnadas* 22 B 774
- (i) *Rai Kishori v Debendra* 15 I A
 37, 15 C 409
- (j) *Barlow v Cooke* 5 Ves 461, and

- other cases cited in argument in
Wilson v Oakes 31 M 283 18
 M L J 331 *Re Segelcke* (1906)
 2 Ch 301
- (k) *Stokes v Cheek* 29 L J Ch 922
- (l) *Wilson v Oakes* 31 M 283 299
Gough v Bull 16 Sim 45, *Re*
Johnston (1894) 3 Ch 204
- (m) *Mexborough (Earl of) v Saville*
 88 L T 131
- (n) *Ellakasse v Durpanarain* 5 C 59
Rai Kishori v Debendra 15 C 409
 P C
- (o) *Alakoanda v Ganesh* 1 C 104
Hemangini v Nobin 8 C 783
 802
- (p) *Barlow v Grant* 1 Vern 255 *Lewis*
v Lewis 16 Sim 266
- (q) *Apreece v Apreece* 1 V & B 365;
Knox v Hotham 15 Sim 82, *Bai*
Amambal v Dosa 15 B 443
- (r) *Lonsdale v Berchford* 3 K & J
 185, *Re Bowles* (1896) 1 Ch 507

139 (S 126). Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

Illustrations.

(i) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(ii). A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

The section. The section applies to the wills of Hindus, *etc.* This section, like the last, deals with an absolute gift with a direction as to the mode of enjoyment, or a gift over in partial derogation of the absolute gift, but differs from it by the fact that the intended benefit or the gift over cannot be given effect to. In such a case the principle laid down in the last section will apply, the gift does not become ineffectual by reason of the failure to secure the specified benefit for the legatee or of the gift over, but the direction will be ignored and the absolute gift will prevail. The general principle, therefore, is that a restriction as regards the mode of enjoyment of an absolute gift is bad. The section extends the operation of the rule to cases where a restriction has become unnecessary, or the purposes have become incapable of execution, or ineffective, or impossible to secure under the circumstances of a particular case (a). The next section makes it clear that the rule laid down in this section is to be confined to the case of an absolute bequest only. The words 'to sever it from his own estate' mean distinguished from the rest of the testator's property (b).

The rule. The rules embodied in this section and the next have been thus laid down:—"If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee,—upon failure of such objects, the absolute gift prevails, but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment

(a) *Bechar Akha v De Cruz*, 19 B 221 on app 770, *Soundararajan v. Natarajan*, 44 M 444, gift over or settlement failing, the original gift

becomes absolute
(b) *Bothamley v Sherson*, 20 Eq 304 cited under S 142

all persons who attain the age of 21 to enter upon the absolute use and enjoyment of the property given to them by will notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age —unless during the interval the property is given for the benefit of another' (a) But where a limited interest is given for a definite period on the expiry of which an absolute interest will vest in the legatee the restrictions during that period will be good and not in infringement of the rule laid down in this section (b)

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- (a) *Gosling v Gosling* John 265 275 cited in *Gosavi v Rivett Carnac* 13 B 463 *Husenbhoj v Ahmedbhoj* 26 B 319 *Raneemoney v Prem money* 9 C W N 1033 *Bramamayi v Joges* 8 B L R 400
- (b) *Prasulla v Jogendra* 1 C L J 605 9 C W N 528
- (c) *Bai Bapi v Jannadas* 22 B 774 Adm. Genl v *Ascar* 3 C 553 *Re Coutourier* (1937) 1 Ch 410 *Re Johnston* (1894) 3 Ch 204
- (d) *All Genl v Greenhill* 33 Beav 193
- (e) *Brown v Bardett* 12 Ch D 667
- (f) *Re Macchu* 21 Ch D 838 *Re Dugdale* 33 Ch D 176
- (g) *Re Elliott* (1876) 2 Ch 353
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- (i) *Rai Kishor v Debendra* 15 I A 37 15 C 409
- (j) *Baron v Cooke* 5 Ves 461 and

- other cases cited in argument in *Wilson v Oakes* 31 M 283 18 M L J 331 *Re Segelcke* (1906) 2 Ch 301
- (k) *Stokes v Cheek* 29 L J Ch 922
- (l) *Wilson v Oakes* 31 M 283 299 *Gough v Bull* 16 Sim 45, *Re Johnston* (1894) 3 Ch 204
- (m) *Alexborough (Earl of) v Saville* 83 L T 131
- (n) *Ellokasee v Durpanarain* 5 C 59 *Rai Kishor v Debendra* 15 C 409 P C
- (o) *Mokondo v Ganes* 1 C 104 *Hemangini v Nobin* 8 C 783 802
- (p) *Barlow v Grant* 1 Vern 255, *Lewis v Lewis* 16 Sim 266
- (q) *Apreece v Apreece* 1 V & B 365; *Knox v Hatham* 15 Sim 82 *Bai Ramabai v Doss* 15 B 443
- (r) *Lonsdale v Bercholdt* 3 H & J 185, *Re Bowles* (1876) 1 Ch 507

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(i) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(ii). A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

The section. The section applies to the wills of Hindus, etc. This section, like the last, deals with an absolute gift with a direction as to the mode of enjoyment, or a gift over in partial derogation of the absolute gift, but differs from it by the fact that the intended benefit or the gift over cannot be given effect to. In such a case the principle laid down in the last section will apply, the gift does not become ineffectual by reason of the failure to secure the specified benefit for the legatee or of the gift over, but the direction will be ignored and the absolute gift will prevail. The general principle, therefore, is that a restriction as regards the mode of enjoyment of an absolute gift is bad. The section extends the operation of the rule to cases where a restriction has become unnecessary, or the purposes have become incapable of execution, or ineffective, or impossible to secure under the circumstances of a particular case (a). The next section makes it clear that the rule laid down in this section is to be confined to the case of an absolute bequest only. The words to sever it from his own estate mean distinguished from the rest of the testator's property (b).

The rule. The rules embodied in this section and the next have been thus laid down—"If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee,—upon failure of such objects, the absolute gift prevails, but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment

(a) *Bechar Akha v De Cruz*, 19 B 221 on app 770, *Sundararajan v Natarajan*, 44 M 444, gift over or settlement failing, the original gift

becomes absolute
(b) *Bolhamley v Sherson*, 20 Eq 304 cited under S 142

fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case the gift is only for a particular purpose, in the former the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee. In every case, therefore, it must be a question of construction," and as such the intention that the gift should be absolute is to be collected from the whole will (a). The rule laid down in the section will apply only where the benefit cannot be obtained for a legatee.

The same principle has been put thus.—"In this case, as in all others of the same description, the question is, whether, having regard to the general purport and effect of the will, the words import an absolute gift modified only by certain restrictions, so that the absolute gift may have its full effect in every event to which the restrictions are inapplicable, or, whether the effect is to give a restricted or limited interest only, so as not to be affected or enlarged by any failure of the subsequent limitations. That is the question" (b). In *Hancock v. Watson* (c), Lord Davey observes "It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or the next of kin as the case may be." It is immaterial whether the gift is to the legatee direct or through the medium of trustees, that is, to a trustee for the benefit of the legatee, provided it be for the benefit of the legatee absolutely, subject to the restriction as to the mode of enjoyment (d).

Cases. Where there was an absolute gift in favour of a legatee with subsequent provisions which were simply qualifications of the gift for the benefit of the legatee, *held*, the gift was absolute and so on the death of the legatee his legal representatives were entitled (e). Similarly, a gift (f) to a widow and children was considered to be an absolute gift with restrictions as to the mode of its enjoyment, so on the death of the children and the fulfilment of other conditions by the widow, the absolute gift in her favour was unaffected as if the will contained no directions or restrictions. Where a testator directed his executor to set aside £200 and thereout to pay to the (testator's) widow 'the sum of £3 monthly so long as she remains unmarried or until the said sum of £200 becomes exhausted' and she died without having married and without having exhausted the said sum of £200, *held*, her executrix was entitled to the balance of £200 (g). Where there was a gift for life to A and "for making a further provision for the maintenance of" A, a commission in the army was directed to be purchased for him for a sum

- (a) *Lassence v. Tierney*, 1 M & G 551, 561-2, see *Re Bowles*, (1895) 1 Ch 507, *Re Howard*, (1901) 1 Ch 412.
 (b) *Schwalm v. Watson*, 10 Beav 200, see *Re Skinner's Trusts*, 1 J & H 102.
 (c) 1902 A C 14, see *Re Currie* (1910) 1 Ch. 329; *Moryoseph*

- v. Moryoseph* (1920) 2 Ch 33
 (d) *Re Hamilton*, 87 L. J Ch. 433
 (e) *Adm Genl. v. Ahear*, 3 C 553
 (f) *Haliburton v. Adm. Genl* 21 C 488.
 (g) *Re Howard*, (1901) 1 Ch. 412, *Re Sanderson's Trusts*, 3 L. & J 497

not exceeding £6,500 the purchase of commission being abolished, the benefit intended for A could not be obtained, *held*, A was entitled to the sum of £6,500 (a) Where a legacy was given to pay off a mortgage debt and the mortgage was foreclosed in the testator's life time, the legatee was held entitled to the legacy (b).

140 (S. 127). Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of estate of the testator.

Bequest of fund for certain purposes, some of which cannot be fulfilled.

Illustrations.

(i) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children. The son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(ii) A bequeaths the residue of his estate, to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

1. *The section* The section applies to the wills of Hindus etc. It has been already stated in the notes to the previous section that it is a question of construction from the whole will of the testator whether he intends to make an absolute bequest or not. If the bequest be construed as absolute any direction of the testator limiting the bequest to certain purposes is void when the purposes cannot be fulfilled, so that the absolute gift takes effect, but "where there is a diminution of the original gift", i. e., where the original gift is not absolute but qualified, or as the section says, is made for certain purposes, then "whatever interest is not exhausted by the gift as so diminished remains the property of the testator" (c). In *Tarakeswar v. Soshi* (d) the gift was construed to be not absolute because it was expressed to be limited for certain purposes and alienation was forbidden. The attempt to create an estate tail having failed it was held that the will did not confer an absolute estate on the legatee. The Court has to construe whether there is an absolute gift or whether by a series of limitations a trust is intended to be formed. This question, viz., whether the original gift is absolute or qualified, is one not free from difficulty (e).

2. *Precatory trusts.* A testator sometimes leaves a legacy desiring it to be used for a certain purpose without using any imperative words or giving any express direction, then the question arises, not as in this section what is to be

(a) *Palmer v. Flower*, 13 Eq. 250.
(b) *Lockhart v. Hardy*, 9 Beav. 379.
Parsons v. Coke, 27 L. J. Ch. 828.
(c) *Gomperz v. Gomperz*, 2 Phil. 107.
Cooper v. Mantel 22 Beav. 231.

(d) 9 C. 952; see *Siva Rau v. Villa Bhatta*, 21 M. 425.
(e) *Re Payne* (1927) 2 Ch. 1 distinguished.
Re Marshall, 1928 Ch. 661.
Bechar v. De Cruz, 19 B. 221.

(u) The words must be imperative. Where the words are not imperative and the original gift is absolute the direction of the testator may impose a moral but not a legal obligation (a). In some cases however, where the words are not imperative but the directions of the testator are to take effect not in defeasance of the estate of the prior taker but after his death, a precatory trust has been held to arise (b).

7 **Secret trust (c)** There is another class of trusts known as Secret Trusts, where the ostensible gift of a testator comes into conflict with a secret communication of his intention. Thus the testator may leave a legacy to A but at the same time secretly communicate to A that the gift is to be held by him for a certain purpose or for the benefit of a certain individual then the effect is to create a trust (d). As a matter of fact trusts first originated in this way before they came to be recognised in law, in fact before even wills were recognised. There was an out and out conveyance to a certain individual and he was charged to hold the property for the use of a certain individual. Law did not recognise the use but it could be enforced in equity as binding on the conscience of the grantee. Trusts thus came to arise under the influence of the Chancellor. Lord Cairns thus describes a secret trust — Where a person knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than for his own benefit either expressly promises or by silence implies that he will carry the testator's intention into effect and the property is left to him upon the faith of that promise or undertaking it is in effect a case of trust (e).

8. **Conditions of a valid secret trust** A secret trust to be valid must satisfy the following conditions

(i) *There must be a gift to a person* Where there is no gift but a special power is created, a direction to dispose of property in accordance with the testator's wishes is not valid (f). In case of a joint gift the interest of all the legatees will be affected by the trust (g). In case of a gift in common, the interest of one only may be affected (h). There is also a difference between those cases in which the will is made on the faith of an antecedent promise by a legatee to carry out the testator's wishes and those in which the will is left unrevoked on the faith of a subsequent promise by a legatee (i). An absolute gift is not compatible with a secret trust. In all these cases there would be no use in the secrecy unless the trust were such as to render it necessary to make the bequest an out and out gift on the face of the will (j).

- (a) *Parnall v Parnall* 9 Ch D 96
Johnston v Rowlands 2 D G & S 356. *Re Hutchinson & Tenant* 8 Ch D 540. *Lamb v Games* 6 Ch 597. *Mackell v Mackell* 14 Eq 49. *Re Adams & Kensington Vestry* 27 Ch D 394. *Missouri Bank Ltd v Raynor* 91 A 79 4 A 500. *S. v. Natha v Dhunkali* 23 B 1 10
 (k) *Gully v Cregoe* 24 Beav 18. *Le Merchant v Le Merchant* 18 Eq 414, but this view has been disapproved in *Johnston v Rowlands*

- 2 D G & S 356
 (c) J 884 sq 7 Ed
 (d) *Re Maddock* (1902) 2 Ch 220
 (e) *Jones v Bradley* 3 Ch 362, *Manuel v Jnana* 31 M 187 195
 (f) *Re Helley* (1902) 2 Ch 846
 (g) *Russell v Jackson* 10 Hare 234
Freeman v Lang (1899) 2 Ch 355 359
 (h) *Re Stead* (1900) 1 Ch 237 (the law is succinctly stated)
 (i) *Re Stead* (1900) 1 Ch 237
 (j) *Moss v Cooper* 1 J & H 352, 365

(ii) *There must be an intention to create a trust* This must be clearly established by evidence (a) The intention may not have been put into writing, yet it will operate as a trust in order to prevent fraud on the testator by a legatee to whom a legacy has been given on the strength of his promise to carry out the testator's intention (b)

(iii) *There must be a communication of the intention that the legatee is to hold on trust* Communication ought to be before the date of the will (c), at any rate it must be before the testator's death (d) 'No case has yet decided that a testator can by imposing a trust upon his devisee or legatee the objects of which he does not communicate to him, enable himself to evade the Statute of Wills by declaring those objects in an unattested paper found after his death (e)

(iv) *There must be acceptance or acquiescence by the legatee* After the communication of intention by the testator the legatee must promise to act accordingly. Without such acceptance, either expressed or implied by the legatee there can be no trust (f) e.g., a testator may say to the legatee 'Here is my will I want a promise from you to dispose of it in a particular way,' and if A, by his silence leads the testator to believe that the legacy will be so applied, a trust will be created and it is immaterial whether the promise is made before or after the execution of the will (g)

(v) *Evidence of the trust* Although a will is required to be in writing yet parol evidence is admissible to establish a secret trust, thus depriving a legatee of the benefit given him by the will when there is a communication made to him and an obligation accepted by him (h) Evidence is admissible when there has been a communication of a secret trust (i) Such evidence is admissible for the purpose of proving matters not defined by the will but not for the purpose of contradicting the will (j) A secret trust is enforced and evidence is admitted to prove it for the prevention of fraud, i.e. in order to prevent a legatee from applying property to a purpose foreign to that for which he undertook to hold it (k) Fraud in this connection is to be understood not in the sense of the term in which it is used in this country but in the narrower sense in which it is used in England (l) The jurisdiction of the Court is founded on fraud and the Court interferes to prevent the perpetration of fraud The trusts will be valid even if proved by oral evidence (m)

- (a) *Jones v Bradley* 3 Ch 362
Mc Cormick v Grogan 4 H L 82, *Re Pitt Rivers* (1902) 1 Ch 403
 (b) *Russell v Jackson* 10 Hare 204, *Re Maddock* (1902) 2 Ch 220
 (c) *Re Fleetwood* 15 Ch D 594 (see cases reviewed)
 (d) *Re Boyes* 26 Ch D 531 *Taylor v Rajah of Parakimedi* 32 M 443
 (e) *Re Helley* (1902) 2 Ch 866
 (f) *Jones v Bradley* 3 Ch 362, *Re Pitt Rivers* (1902) 1 Ch 403
 (g) *Mcoss v Cooper* 1 J & H 352 366 7
 (h) *Moss v Cooper* 1 J & H 352 366

- (i) *Kali v Ram* 30 C 783, *Russell v Jackson* 43 Ch D 615 *Re Pitt Rivers* (1902) 1 Ch 403 *Irvine v Sullivan* 8 Eq 673
 (j) *Re Huxtable* (1902) 2 Ch 793 cited in *Boyalat v Haridas* 40 B 1
 (k) *Jones v Bradley* 3 Ch 362
 (l) *Taylor v Rajah of Parakimedi* 32 M 443 453
 (m) *Manuel Cunha v Inana Coelho* 31 M 187, 196 199, 18 M. L. J 158 In *Taylor v Rajah of Parakimedi* 32 M 443 there was difference of judicial opinion on the admissibility of a letter written 3 years after the will

9. Effect of fallure of trust. Where a trust is intended and the fact is communicated to the legatee he cannot take beneficially (a) even though no trust has actually been declared, so also where the trust is illegal or the whole of the legacy is not exhausted on the object of the trust (b) But in *re Pitt-Rivers* (c) the testator's wish did not amount to a trust, and the object of the trust not being in view of law a charity, the gift was invalid as it infringed the rule against perpetuity, and it was held that the promise by the legatee did not create a trust but he took the gift absolutely. So also where there is no communication by the testator of his intention to the legatee to create a trust, the gift to the legatee becomes absolute (d) Where a legatee stated that she came to know of the testator's wishes after his death, held, it was a clear gift unaccompanied by any conditions (e) Where a trust is created in respect of a part of a gift to a legatee, the onus is on the legatee "to distinguish that part which is affected by the trust; and if he fails in making that distinction, to the extent he so fails, the Court holds the property to be bound by the trust" (f).

Executory trusts. There is another class of trusts, known as Executory Trusts, which are met with in wills (and in marriage settlements in England) These arise where a testator has not expressed with precision, but has left it to the Court to make out from general expressions, what his intention is In a sense every trust is executory, for a trust created by will cannot be executed except by conveyance and therefore there is always something to be done (g) The true criterion of distinction between an executed and an executory trust is this: "Wherever the assistance of the Court is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the Court should model the limitations, but where the trusts and the limitations are already expressly declared, the Court has no authority to interfere, and make them different from what they would be at law" (h) As Sir George Jessel has observed. "It is called an executory trust, where the testator, instead of expressing exactly what he means—that is, filling up the terms of the trust, tells the trustees to their best to carry out his intention In that way it is executory, that if he has not put into words the precise nature of the limitations he has said in effect. 'Now there are my intentions, do your best to carry them out' (i)

Where the words of the "will are improper or informal the Court will not direct a conveyance according to such improper or informal expressions but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties" (j) In these cases, the direction

- (a) *Manuel Kunha v Coelho*, 31 V 186, 200
 (b) *Re Boyce*, 26 Ch D 531
 (c) (1902) 1 Ch 403; See *Russell v Jackson* 10 Hare 204
 (d) *Moss v. Cooper*, 1 J & H 352, 365
 (e) *Re Shields*, (1912) 1 Ch. 591, 650
 (f) *Russell v Jackson*, 10 Hare 204, 214
 (g) *Erwin v Brownlee*, 4 H L C

- 1 210 *Doncaster v Doncaster*, 3 K & J 26, *De Haelland v De Saumarez*, 14 W. R 118, *Glenorchy v Borville Talb Cas Temp 3*.
 (h) *Austen v Taylor*, 1 Edm 366
 (i) *Miles v Harford* 12 Ch D 691, 699, *Jenole v Duke of Northumberland*, 1 J & W 570
 (j) *Lord Stamford v Hobart* 3 Bro P C. 31-33 cited in *Sackville West v Holmendale*, L. R 4 H L 543

Illustration

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator without having proved the will. A has manifested an intention to act as executor.

1. The section The section applies to the wills of Hindus, *etc.* The operation of the section is confined to the case of a bequest by a testator to the executor of his own will. It does not extend to a case of a gift whether substitutional or in remainder to the executor of another person, *e.g.*, where a testator makes a gift to A or his representatives (a), or to A or his legal representatives, or to A and in case of his death to his executors or administrators. In all such cases A gets a vested interest in the legacy and his representatives or executors or administrators do not take anything beneficially (b). The rule is the same in case of a gift to the executors or administrators of a deceased person (c). But a gift to the executors or administrators of A has been construed in several cases as conferring a benefit on the executors or administrators personally, there being no contrary intention expressed by the testator (d). Even in case of a gift to the testator's own executor, if the executor predeceases the testator he is not entitled to the legacy, but if the executor was a child of the testator, the executor's lineal descendant may claim the benefit under S. 109 (e). Again, where a legacy is given to an executor on condition, for example, of satisfying the testator's debts, the executor is entitled to the gift only on satisfaction of the condition (f). An annuity given to an executor or administrator for his trouble is payable even though an agent be employed to collect rents (g), but not if it be given expressly for certain services which he does not discharge personally (h). An infant executor cannot take a legacy unless he accepts the office and duties, *i.e.*, until he attains majority, and the legacy does not carry interest till it becomes payable (i). The section applies where a legacy is given to a person who is subsequently in the will appointed executor (j) or where the appointment is made by will and the legacy is given by a codicil naming him (k). But an additional executor appointed by a codicil is not entitled to a share in the legacy given by the will to the executors thereof (l).

2. The rule The rule is that where either a general or a specific legacy is given to an executor he must prove the will in order to entitle himself to it (m). Nothing is so clear as that if a legacy is given to a man as executor, whether

- (a) The word 'representatives' in case of an immediate gift may mean the next of kin. *Re Ware* 45 Ch. D. 269. See S. 94 notes.
- (b) *Aspinall v. Duckworth* 25 Beav. 471, *Pike v. Strange* 6 Madd. 159, *Maxwell v. Maxwell* 2 Lq. 478, *Re Valdez Trust*, 40 Ch. D. 159.
- (c) *Trethewy v. Helyar* 4 Ch. D. 53.
- (d) *Halls v. Taylor* 8 Sim. 241, *Trethewy v. Helyar* 4 Ch. D. 53, *Re Valdez Trust* 40 Ch. D. 459.

- (e) *Ramaswamy v. Kuppaswami*, 13 M. L. J. 351.
- (f) *Doe v. Gregory* 10 Sim. 393, 399.
- (g) *Wilkinson v. Wilkinson* 2 Sim. & Sta. 237.
- (h) *Re Muffell*, 55 L. T. 671, 56 L. T. 685.
- (i) *Re Gardner* 67 L. T. 552.
- (j) *Re Appleton* 29 Ch. D. 893.
- (k) *Stackpoole v. Howell* 13 Ves. 417.
- (l) *Hillenden v. Groce* 21 Beav. 518.
- (m) *Griffiths v. Pugh*, 11 Sim. 212, see *Re Freeman* (1910) 1 Ch. 651.

expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor' (a)

3 Difference between English and Indian law In England the presumption that the legacy to an executor is given to him in that character may be rebutted (b) The courts have allowed very minute circumstances to take cases out of the general rule (c) Thus a legacy to my friend A' who is appointed executor (d), or to my cousin (e) or a legacy given as a mark of the testator's respect (f) will take the case out of the operation of the rule In India, however the rule is not based on presumption but is one of law and therefore does not admit of rebuttal As have been said 'the language is peremptory and leaves no room for presumption An executor to be entitled to his legacy must either accept office or manifest an intention of to act (g) If a legacy to an executor has once become payable it cannot by anything that has happened afterwards cease to be payable (h)

4 Proves The will may be proved any time before the administration of the estate is concluded (i) Where, however, the will has been proved and probate obtained fraudulently in order to be entitled to the legacy, the executor will lose the legacy, so also where on account of his misconduct the executor is restrained from interfering with the estate (j) Even where the executor is prevented from proving the will or acting by illness (k) or by death (l) he is not entitled to the legacy nor is he entitled where he renounces probate (m) But where an executor to whom the residuary estate is given proves the will but dies before fully performing the trust under the will he is entitled to the legacy (n) An executor does not forfeit his legacy by the mere filing of an administration suit (o)

5 Manifests an intention to act As a general rule there must be unequivocal evidence of an intention to act and that evidence is best given by the probate of the will But if an executor has actually acted as executor, either by paying debts, or giving directions for the funeral, or sent a power of attorney under which another person administered the estate, that is sufficient to entitle him as executor to the legacy But if he has not done any act as executor, nor proved the will, although he may have been prevented by illness, or infirmity, and although he may have survived the testator for two years, he will not be entitled (p) Thus, where an executor died before probate was obtained but had concurred with the other executors in giving directions for

- (a) *Harrison v Rowley* 4 Ves. 216
 (b) *Re Appleton* 29 Ch. D 893
Stackpole v Howell 13 Ves 417
 (c) *Willes v Davies* 22 L. J. Ch 497
 (d) *Cockrell v Barber* 2 Russ 555
Re Denby 10 W. R. 115
 (e) *Dix v Reed* 1 Sim & Sta 287
 (f) *Bath v Delverton* 13 Eq 131
 (g) *Prosser v Adm Genl* 15 C. 83
 (h) *Brydges v Watson* 1 V & B 134
 (i) *Reed v Decoyne* 3 Bro. C. C. 95.
Angerman v Ford 29 Bear

- 349
 (j) *Herford v Browning* 1 Cox. 302.
 (k) *Re Hawkins Trusts* 33 Bear 570.
Slaney v Halsey 2 Eq 41.
 (l) *Guthrie v Pruett* 11 Sim. 202.
 (m) *Calvert v Sutton* 4 Bear 222.
see Re Appleton 29 Ch. D 893.
 (n) *Hill v Smith v Grissett* 15 Sim 52.
 (o) *Baker v May* 8 Sim 25.
 (p) *Lewis v Lewis* 6 Eq 277.
Harrison v Rowley 4 Ves 216

the funeral and in paying small sums on that occasion, *held*, he was entitled to the legacy as "he has demonstrably shown his intention to act in the execution of the trust for which he with two other persons was to receive these legacies" (a) Such unequivocal intention to act is best manifested by the proving of the will, when one is in a position to prove it, otherwise, "the Court will require a very strong reason for the omission before finding that the intention existed" (b)

CHAPTER XIV.

OF SPECIFIC LEGACIES

142 (S. 129). Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Illustrations

(1) A bequeaths to B—

'the diamond ring presented to me by C'

'my gold chain';

'a certain bale of wool'

'a certain piece of cloth'.

'all my household goods which shall be in or about my dwelling house in M Street, in Calcutta, at time of my death'.

'the sum of 1,000 rupees in a certain chest'

'the debt which B owes me'

'all my bills bonds and securities belonging to me lying in my lodgings in Calcutta'

'all my furniture in my house in Calcutta'

'all my goods on board a certain ship now lying in the river Hughli'

'2 000 rupees which I have in the hands of C'

'the money due to me on the bond of D'

'my mortgage on the Rampur factory'

'onehalf of the money owing to me on my mortgage of Rampur factory'

'1 000 rupees being part of a debt due to me from C'.

'my capital stock of 1,000 l in East India Stock'.

'my promissory notes of the Government of India for 10 000 rupees in their 4 per cent loan'

"all such sums of money as my executors may, after my death, receive in respect of the debt due to me from the insolvent firm of D and Company"

'all the wine which I may have in my cellar at the time of my death .

"such of my horses as B may select'

"all my shares in the Imperial Bank of India"

'all my shares in the Imperial Bank of India which I may possess at the time of my death'

"all the money which I have in the 5½ per cent loan of the Government of India"

'all the Government securities I shall be entitled to at the time of my decease'

Each of these legacies is specific

(ii) A, having Government promissory notes for 10,000 rupees, bequeaths to his executors 'Government promissory notes for 10 000 rupees in trust to sell for the benefit of B The legacy is specific.

(iii) A, having property at Benares and also in other places, bequeaths to B all his property at Benares The legacy is specific

(iv) A bequeaths to B—

his house in Calcutta

his zamindari of Rampur

his taluq of Ramnagar

his lease of the indigo factory of Salkya

an annuity of 500 rupees out of the rents of his zamindari of W

A directs his zamindari of X to be sold, and the proceeds to be invested for the benefit of B

Each of these bequests is specific

(i) A by his will charges his zamindari of Y with an annuity of 1 000 rupees to C during his life, and subject to this charge he bequeaths the zamindari to D Each of these bequests is specific

(ii) A bequeaths a sum of money—

to buy a house in Calcutta for B

to buy an estate in zila Faridpur for B

to buy a diamond ring for B

to buy a horse for B

to be invested in shares in the Imperial Bank of India for B

to be invested in Government securities for B

A bequeaths to B—

"a diamond ring" .

"a horse" .

'10 000 rupees worth of Government securities

'an annuity of 500 rupees

"2,000 rupees to be paid in cash'

"so much money as will produce 5,000 rupees four per cent Government securities'

These bequests are not specific

(iii) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may

'estate in India. He also bequeathed a sum of Rs 100 and directs that it should be paid out of property which he may have in England. The conditions of the bequest are specific.

1. The section. The section says as follows: "The word 'specific' shall mean—"

2. Specific legacy. (a) A specific legacy is the gift of something which the testator intends that he or she should enjoy and pass to the executor of every other than himself. (b) It is a gift of a thing not necessary. (c) Thus if a testator gives 'the black horse which I now have in my stable,' he intends to give a specific gift to the executor or any other horse that may resemble it (d). No satisfactory definition has been given of a specific legacy. The following are some of the attempts made in the current law. "It is a part of the testator's property, a part as distinguished from the whole. It must be what is called a severed or distinguished part." (e) It has been defined as something 'which a testator identifies by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description separates in favour of a particular legatee, from the general mass of his personal estate' (f). Or again it has been defined as 'a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie' (g). There are objections to most of the definitions but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed in specie (h). A specific legacy has been said to be a bequest of a particular chattel specifically described and distinguished from all other things of the same kind, or in other words an individual legacy (i).

3. Difference between general and specific legacies. It has been seen that a specific legacy is a specifically described or identified or distinguished part of the testator's property. But in the case of a general legacy it has no reference to the actual state of the testator's property it being only supposed that the testator has sufficient property which on being realised will procure for the legatee that which is given to him while in the case of a specific bequest it must be a part of the testator's property itself (j). Therefore in case of a specific bequest the legacy fails if no such thing exists at the time of the testator's death (k), whereas in case of a general legacy the executor must procure the thing for the legatee if the estate of the testator permit (l). A specific legacy cannot be of the whole or of the totality of the testator's property (m). Thus, there are differences in the legal incidents (n). A specific legacy, if vested and income bearing carries income if any from the testator's

(a) *Re Young* 52 L. T. 754. See S. 150 note.

(b) *Per Jewell M.R. in Bothamley v Sherrin* 20 Eq. 334.

(c) *Robertson v Brokens* 8 A.C. 813.

(d) *Giles v Melism* L.R. 6 H.L. 24, 29.

(e) *Felling v Preston* 1 D.G. & J. 434. *per Lord Cranworth*.

(f) *Pune v Snodgrass* 1 Atk. 417. *id.*

to in *Hanon v Pike* 1 P.W. 539. *id.*

(g) *Bothamley v Sherrin* 20 Eq. 304.

(h) *Evans v Tripp* 6 Madd. 92, see S. 152.

(i) *Brandon v Winter* Amb. 57. See S. 171.

(j) See *Re Comp...* (4) 2 Ch. 119. See S. 1 (redemption).

death (a), even though enjoyment be postponed (b), but a contingent specific legacy does not as a rule carry the income (c) The costs of transfers of specific legacies are borne by the legatees (d)

4. Specific and demonstrative legacies A legacy payable out of a fund or any real estate may be specific or demonstrative, that depends on the fact whether the testator does or does not express an intention that the legatee shall have the money, whether the fund or estate be available and sufficient for its payment (e) The nature of the distinction will appear more plainly on a consideration of the next few sections

5. Test. It can not be as Lord Cranworth has said something directed by testator "to be enjoyed in specie" (f) for a gift of the residue of personalty, so directed, will not make the legacy specific (g) Another test has been suggested, namely, that a specific legacy is liable to ademption (h) It is however now settled that a specific legacy may be given of property not possessed by the testator at the time of the execution of the will but possessed by him at the time of his death (i).

The question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument, and so it has been always considered The true test by which to determine whether a bequest is or is not specific is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or necessity for a sale for payment of debts, and to enquire whether or not in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees (j)

6 Property to which a specific legacy refers A will refers as regards property, to that which the testator leaves at the time of his death, therefore with regard to specific gifts all properties answering to the description mentioned in the will existing at the time of the testator's death will be included in the legacies (k), but not where a contrary intention is indicated, e g, a bequest of "my piano" has been held can not refer to a piano purchased after sale of

- (a) *Dacies v Folmer* 16 Eq 308.
Re Compton, (1914) 2 Ch 119.
Lock v Venables, 27 Beav 598.
Re Hopkin's Trust, 18 Eq 695.
 (b) *Long v Ooenden*, 16 Ch D 691.
Guthrie v Walrand, 22 Ch D 573.
 (c) *Wyndham v Wyndham* 3 Bro C C 53, *Holmes v Prescott*, 33 L J Ch 264, but see *Re Woodin* (1895) 2 Ch 395, *Re Clements*, (1894) 1 Ch 665.
 (d) *Re Grosvenor*, (1916) 2 Ch 375.
 (e) *Roper* 195 citing *Long v Short*, 1 P W 403, *Creed v Creed* 11 Cl & F. 491, *Mann v Copland* 2 Madd 223, *Dickin v Edward*, 4 Hare 273, *Fowler v Willoughby*, 2 Sim & Stu 354, *Page v Leaping well* 18 Ves 463 *Vickers v Pond* 6

- H L C 885
 (f) *Fielding v Preston* 1 D G & J 438
 (g) *Howe v Dartmouth* 7 Ves 139, *Pickering v Pickering* 4 M & Cr 299
 (h) See *Bothamley v Sherson* 20 Eq 304 309 310, *Howe Dartmouth*, 7 Ves 147
 (i) *Queen's College v Sutton*, 12 Sim 521, *Bethune v Kennedy*, 1 M & C 114, *Bothamley v Sherson* 20 Eq 304 (that is not a sound ground to take)
 (j) *Bethune v Kennedy* 1 M & C 114
 (k) *Lady Langdale v Biggs* 8 D M & G 391, *Goodlad v Barnett*, 1 K & J 341, *Bothamley v Sherson*, 20 Eq 304, *Re Slater* (1907) 1 Ch 665

the one possessed by the testatrix at the date of her will (a) Accessories pass along with the bequest of a chattel As to what are accessories see *re Craigh* (b) But a gift of a box does not include the securities it contains (c)

7 Illustrations of legacies which are specific

(i) *A thing of a fluctuating character* A specific legacy is not necessarily of a fixed character but may increase or diminish to any extent Thus a gift of all my stock in trade of wines and spirituous liquors which I shall be possessed of at the time of my death is specific (d)

(ii) *Part of specific property* A part of specific property (e) or of the proceeds of sale at a price fixed by the testator (f) is specific

(iii) *Power of selection* A gift may be specific though the legatee has a right of selection (g)

(iv) *Debt* A bequest of a debt due to testator may be specific (h) so also a bequest of a part of a debt (i) The forgiveness of a debt amounts to a specific legacy (j)

(v) *Personal property* A gift of the whole of the testator's personal property may be specific (l)

(vi) *Gift of stocks and shares when specific* Prima facie legacies of stocks and shares are general legacies (l) But a gift of 'my stock will be a specific bequest the pronoun *my* has been relied on in many cases in deciding the legacy to be specific (m) A reference to a particular investment by such words as 'now standing in my name' or which I now possess', or 'which I may be possessed of at the time of my death' will make the gift specific (n) The word *now* has similarly been held to make the gift specific (o) A legacy referred to as the interest arising from money in L W Company has been

- (a) *Re Sikes* (1921) 1 Ch 364 *Re Clifford* (1912) 1 Ch 29 See *Re Slater* (1907) 1 Ch 665
 (b) 99 L T 390 100 L T 284
 (c) *Re Hunter* 25 T L R 19 *Re Robson* (1891) 2 Ch 559
 (d) *Stewart v Denton* 4 Doug 219 see *Sayer v Sayer* 2 Vern 688 *Nisbett v Murray* 5 Ves 150 *Re Oley* 51 L J Ch 665, *Re Slater* (1907) 1 Cl 665
 (e) *Nelson v Carter* 5 Sim 530, *Oller v Oliver* 11 Eq 506 *Suleman v Dorah* 8 C 1 P C *Fernandez v Coelho* 84 I C 1029
 (f) *Page v Leapingwell* 18 Ves 463 *Re Jeffrey's Trusts* 2 Eq 68
 (g) *Hobson v Blackburn* 1 M & L 571 *Topley v Eagleston* 12 Ch D 693, *Willard v Bailey* 1 Eq 378
 (h) *Aikturner v M Guit* 2 Bro C C 109, *Innes v Johnson* 4 Ves 568 *Gardner v Hulton* 6 Sim 93 *Fryer v Harris* 9 Ves 360, *Duncan v Duncan* 27 Bea 354, *Re*

- Wedmore* (1907) 2 Ch 277
 (i) W 753 12 Ed
 (j) *Re Wedmore* (1907) 2 Ch 277
 (k) *Powell v Riley* 12 Eq 175 *Rossey v Early* 42 L J Ch 472 but see *Robertson v Broadbent* 8 A C 812
 (l) *Macdonald v Irvine* 8 Cl D 101 *Re Gray* 36 Ch D 205 *Re Gillins* (1909) 1 Ch 345 *Re Compton* (1914) 2 Ch 119, *Re Hawkins* (1922) 2 Ch 529
 (m) *Asburner v M Guit* 2 Bro C C 108
 (n) *Barton Cooke* 5 Ves 461 *Queen's College v Sutton* 12 Sim 521; *Gordon v Duff* 28 Bea 519; *Kermode v Macdonald* 3 Ch 584 but this construction has been doubted in *Re Horton* (1920) 2 Cl 1
 (o) *Harrison v Jackson* 7 Cl D 339 *Re Nottage* (1835) 2 Cl 657, *Re Pratt* (1894) 1 Cl 411 per contra *Page v Young* 19 Eq 501, *Re Horton* (1920) 2 Cl 1

held to be specific (a) A gift of stock out of a specific stock is specific (b) A legacy of a certain amount of stock directed by the testator to be sold makes it specific (c) Gifts of consols to be divided among a certain number of legatees are specific (d)

(vi) *Leasehold* Where a testator gave all his real and personal properties to his son with a gift over of the leasehold to one daughter and of the funded property and other personal estate to another daughter on the son's death the leasehold being specifically given become specific legacy but the other legacy did not (e) *Legacy of the rent of a leasehold property is specific (f)*

(viii) *Land.* Every devise of land is specific (g) Charges of legacies upon real estate will make them specific when the testator indicates an intention to that effect (h) Gifts of the proceeds of real estate may be specific (i) Annuities payable and issuing out of real estate are specific (j)

8 Illustrations of legacies held to be not specific (k) A direction to lay out money for procuring a certain object for a legatee will not make the legacy specific (l) A direction to transfer a sum does not make the gift specific (m) A partial enumeration of the gifts will not constitute them specific (n) In case of a bequest of a debt where the security is not of the essence of the gift but is merely descriptive of a money gift the legacy is not specific (o) General legacies do not become specific because they are payable out of the proceeds of real estate (p) The charge of legacies upon real estate does not make them specific (q) A bequest of rent producing property on trust the trustees to apply the rents and profits for the benefit of a legatee cannot be regarded as specific (r)

9 Distinguished from all other parts A legacy in such terms as these 'The pink coupons in the pigeonhole are for £3666 send these to Irving and Sade of 1 Copthall Court and he is to pay A £2500, was held to make it specific (s) Bequest of money in a certain chest (t) or in such a hand (u) or secured by certain documents (v) or out of specific money, e.g. out of the dividends

(a) *Re Slater* (1905) 2 Ch 480, (1907) 1 Ch 665

(b) *Monley v Bird* 3 Ves 628, *Dacs v Fowler* 16 Eq 308

(c) *Ashton v Ashton* 3 P W 384
See *Sleech v Thorington* 2 Ves Sen 560

(d) *Re Pratt* (1694) 1 Ch 491 See next S note

(e) *Fielding v Preston* 1 D C. & J 438 *Long v Short* 1 P W 403

(f) *Creed v Creed* 11 Cl & F 50^a

(g) *Treepoorasoodery v Debendra* 2 C. 45 50 *Houze v Dartmouth* 7 Ves 137 147, *Lancefield v Igulden* 10 Ch 136

(h) *Dickin v Edward* 4 Hare 273

Spurway v Glyn 9 Ves 433

(i) *Pave v Leapingwell* 18 Ves 463

Hillam v Hughes 24 Beav 474

Fernandez v Coelho 64 L C. 1029

(j) *Creed v Creed* 11 Cl & F 50^a,

Rudstone v Anderson Ves Sen 418

(k) See the next 4 Sections

(l) *Apreece v Apreece* 1 V & B 364, *Edwards v Hall* 11 Hare 23

(m) *Sibley v Perry* 7 Ves 522

(n) *Fairer v Park* 3 Ch D 309

(o) *Sleech v Thorington* 2 Ves Sen 560, *Macdonald v Irvine* 8 Ch D 101 *Gillaume v Addesley* 15 Ves 384 d approved

(p) *Yann v Copland* 2 Madd 223

Colclle v M'Nelson 3 Beav 570

(q) *Davies v Ashford* 15 Sim 42;

Creed v Creed 12 Cl & F 50^a

(r) *Bal Bhikaji v Bal Dinkal* 13 Bom L R 319

(s) *Re Jeffry's Trusts* 2 Eq 68

(t) *Lewson v S ch* 1 Ark 507

(u) *Horton v Pike* 1 P W 532;

Crocker v Crocker 2 P W 165

(v) *Ginsome v Alderley* 15 Ves 384

of a specific stock (a) or out of a mortgage or other debt (b) is specific (c) A gift of all my furniture in my house in Calcutta whether the reference is to furniture existing at the time of the execution of the will or that which the testator may leave at the time of his death is equally specific (d) But a bequest of all my funded property or estate of whatsoever kind or wheresoever the same or any part thereof may be found has been held to be not a specific gift but an enumeration of the particulars that made up the residue (e)

10 Leaning of Court The Court leans strongly against specific legacies No legacy is held to be specific unless demonstrably so intended (f) The will is to be read with an inclination to hold it a general legacy (g) If the words of the will are equivocal, the Court leans to the construction which makes the legacy general (h) Where the intention is clear *eg* where the testator in making the gift adds it is to be treated as a general not as a specific legacy it will be construed as a general legacy and all the consequences of the legacy being general will follow (i)

11 Evidence Evidence of the state and value of the testator's property in funds is admissible to determine whether a legacy is specific or not (j) All facts relating to the subject matter of the devise such as that it was or was not in the possession of the testator the mode of acquiring it the local situation and distribution of the property are admissible to aid in ascertaining what is meant by the words used in the will (k) Evidence is admissible to show that even when the testatrix uses a general expression *eg* all my real estate she in fact refers to the estate possessed by her at the date of her will (l)

Bequest of certain sum where stocks etc in which invested are described

143 (S. 130) Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will

Illustration

A bequeaths to B—

10 000 rupees of my funded property

10 000 rupees of my property now invested in shares of the East Indian Railway Company

10 000 rupees at present secured by mortgage of Rampur factory

No one of these legacies is specific

- (a) *Dinkwater v Falconer* 2 Ves Sen 673
 (b) *Ford v Fleming* 2 P W 469 *Re Galsger* (1900) 2 Cl 756 1907 A C 112
 (c) *J* 1034 7 Ed
 (d) *Bathamly v Stenson* 20 Eq 304 see illut (1)
 (e) *Bohamley v Sher n* 20 Eq 311
 (f) *Kelly v Peter* 4 Ves 743 752
Jones v Johnson 4 Ves 558
Cheporth v Birch 4 Ves 555 565

- (h) *Sayer v Sayer* 7 Huc 377 387
 (i) *Re Compton* (1914) 2 Ch 119
 (j) *All Genl v Grote* 2 Ru s & M 697 *Bo s v Williams* 2 Ru s & M 689 *Re Hawkins* (1922) 2 Ch 569
 (k) *Doe d Templeman v Meln* 2 B & Ad 771 780 *Ricketts v Turquand* 1 H L C 472 *Wells v Byng* 1 K & J 580
 (l) *Re Glasling on* (1906) 2 Ch 335

The section. The section applies to the wills of Hindus, *etc*. It has been already stated that the intention of the testator determines whether a legacy is specific or not. All that this section says is that where there is a money legacy, the mere fact that the funds or securities in which it is invested are described in the will does not make the gift specific, in the absence of any intention to that effect (a). The reason has been stated to be that the Court leans in favour of a general legacy and, in the absence of express intention, will hold that the testator meant to give a sum of money, and referred to a particular fund only as that out of which, in the first place, he meant the legacy to be paid, and accordingly the legacy will be general (b). Thus a legacy of a certain number of shares (c), of bonds (d) or of stocks (e), of a particular description, has been held not to be specific but equivalent to a legacy of their value in money. Where a testator gave a legacy "of the sum of £12,000 of my funded property to be transferred in his name or employed as it shall appear most beneficial," *held*, the bequest was not specific (f). A direction to transfer a sum is not sufficient (g), what is necessary is a clear intention to give the whole or a definite part of the identical stock held by the testator in order to constitute a legacy specific (h). Therefore, if the legacy be meant to consist of the security it would be specific, though the testator began by giving the sum due upon it (i). A distinction is thus made between a gift of a sum invested in certain funds and a gift of the corpus of such funds, *etc*. In the latter case the legacy will be specific. As has been already stated the use of pronoun 'my' before such funds, *etc* (j) has been construed to make the gifts specific. But the pronoun 'my' is not by any means essential (k). The word 'now' has similarly been held to make a gift specific (l).

Although a mere gift of a certain sum of stock, *etc*, does not alone make the legacy specific, yet a gift of a sum of stock, with a direction that if the stock shall not be in existence the legatee shall have an equivalent sum of money or that the deficiency in the sum bequeathed shall be made up by the purchase of fresh stock makes the legacy specific (m). Similarly, where after a gift of stocks or shares the testator adds "or in whatsoever fund the same shall be found invested," the legacy is specific (n). A bequest has been held to be not specific because it was of a certain sum (o).

- (a) *Gillaume v Adderley*, 15 Ves 385,
Le Grice v Finch 3 Mer 50,
Olicer v Oliver, 11 Eq 506 W
751 12 Ed See note previous S
(b) *Chaworth v Beech* 4 Ves 555
(c) *Re Gray* 36 Ch D 205, *Re*
Gillins (1909) 1 Ch 345
(d) *Macdonald v Irvine*, 8 Ch D 102
(e) *Simmons v Vallance* 4 Bro CC 345,
Wilson v Brownsmith 9 Ves 180
(f) *Gillaume v Adderley* 15 Ves 885
Olicer v Oliver, 11 Eq 506, *Re*
Pratt, (1894) 1 Ch 491
(g) *Sibley v Perry* 7 Ves 522
(h) *Drinkwater v Falconer*, 2 Ves sen
623, *Morley v Bird*, 3 Ves 628,
Townshend v Martin, 7 Hare 471,

- Re Pratt*, (1894) 1 Ch 491
(i) *Ashburner v Al Gulre* 2 Bro C
C 108
(j) *Measure v Carlton* 30 Beav 538,
Re Clifford, (1912) 1 Ch 29 See
S 142 note
(k) *Parrott v Worsfold* 1 J & W
594, *Hosking v Nicholls* 1 Y &
C C 478
(l) See Note S 142
(m) *Townsend v Martin* 7 Hare 471,
Queen's College v Sutton 12 Sim 52
(n) *Hosking v Nicholls*, 1 Y & C C
478
(o) *Bai Bhikaji v Bai Dinbai* 13
Bom L R 319

144 (S. 131). Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Illustration

A bequeaths to B 5,000 rupees five per cent Government securities. A had at the date of the will five per cent Government Securities for 5,000 rupees. The legacy is not specific.

The section. The section applies to the wills of Hindus, *&c.* The mere possession by the testator of an exactly equal or greater amount than that bequeathed can give no indication as to the testator's intention, namely, whether he had any intention of giving the identical stock or shares, or any portion thereof, to the legatee which alone can make the legacy specific. A legacy of a sum of money will be demonstrative and not specific simply because it is payable out of some stock referred to and left by the testator (a). "The bequest of a sum of stock in pounds, shillings and pence, being the exact amount of the stock the testator possesses at the date of the will, is a general legacy unless there is something else in the will to indicate that the testator intended it to be specific" (b).

The rule. The rule has been thus stated—"The mere circumstance of the testator having, at the date of his will a particular property, of equal amount to the bequests of the like property which he has given without designating it as the same (as he possessed), is not a ground upon which the Court can conclude that the legacies are specific. There is no description or reference to show that he meant to give the particular shares which he had at the date of his will. He gave nothing which was distinguished or severed from the rest of the testator's estate, but in effect gave such an indefinite sum of money as would suffice to purchase so many shares as he had given, those shares being any such shares as could be purchased, and not certain particular or defined shares" (c). "Prima facie a legacy of stock or of shares is general notwithstanding that the testator at the date of the will possessed the precise amount of stock or the precise number of shares. This rule, however, only furnishes a general guide to the construction of such bequests, and necessarily yields to any other indications of the testator's intention appearing from the language used in his will construed with reference to such surrounding circumstances as may legitimately be taken into account in arriving at its true meaning (d). But if the intention be to give the identical stock left by the testator the legacy will be specific (e). Where

(a) See S. 143 *illustr. Kirby v. Puller* 4 Ves. 744; *Mullins v. Smith* 1 Dr. & Scr. 204; *Davies v. Fowler* 16 Eq. 364.
(b) *Re H's Goods* (1921) 2 Ch. 327 (note head), see *Macdonald v. Innes*,

A Ch. D. 102.
(c) *Robinson v. Addison* 2 Beav. 515.
(d) *Re Hawkins* (1922) 2 Ch. 569.
(e) *Haskins v. Nicholls*, 1 Y. & C. C. 478; *Attwater v. Attwater* 18 Beav. 330.

a testator gave certain legacies of stock and then said that if he should not be possessed of any such stock then the legatee was to get its value in money Kindersley V C observed — As the testator had stock to answer the bequest at his decease those legacies were specific but if he had no such stock at his decease then the bequest of the money would have been not specific but general legacies They are not money legacies payable out of a particular property (which would be demonstrative legacies) but they are legacies of specific portions of a particular property which he contemplated being in possession at his death (which are specific legacies) In other words the character of the legacy is determined by the intention of the testator (a) In *Davies v Fowler* (b) *Malins V C* observes If she (the testatrix) has meted out or divided the stock amongst the legatees in certain proportions the legacies are specific If on the other hand the property is to be converted into money, and out of the produce of stock the legacies are to be provided then they are general legacies

145 (S. 132). A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place

Bequest of money where not payable until part of testator's property disposed of in certain way

Illustration

A bequeaths to B 10 000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realised in England The legacy is not specific

The section The section applies to the wills of Hindus *etc* It is the intention of the testator that determines the character of the legacy (c) A money legacy is *prima facie* general A direction to postpone payment on the grounds mentioned in the section does not mean a gift of a specific part of the testator's estate as distinguished from the rest which alone can make the legacy specific The following reasons given in *Mann v Copland* (d) for holding a legacy demonstrative are *mutatis mutandis* applicable to the present case In that case Sir T Plumer observed — The testator first gives the annuity of £ 10 and then proceeds to say out of what it is to be paid first the real estate if it exists and next the £ 5 per cents but the legacy may stand though the fund out of which it is directed to be paid does not exist The legacy is not so specific and so connected with the fund as to fail if there is no such fund it appearing there was a fixed separate distinct intent to give the legacy the particular property out of which it was to be paid being a secondary thought

Illustrations Where a testator bequeathed to his executors two sums of £10 000 each of current money to be invested in certain securities upon trust for the payment out of the interest or dividend to certain legatees *held* the

(a) *Malins v Smith* 1 Dr & Sm 204 210 see *Page v Young* 19 Eq 501 *Re Pratt* (1894) 1 Ch 491 per contra *Mylton v Mylton*

19 Eq 30
(b) 16 Eq 303.
(c) See previous Sec note
(d) 2 Madd 223

legacy was not specific as nothing more than £ 20 000 could have been invested. The legacy was of money (a). The illustration in the section is taken from the case of *Sadler v Turner* (b), where a testator directed the payment of legacies 'as soon as my property in India shall be realised in England'. Sir W Grant observed, 'For the convenience of his estate, he says, they shall not be paid, till his property in India is realized in England. Suppose, all had been remitted, except a very small sum must these legacies have failed. His property in India would have been remitted, and the legacies are given. They are therefore general legacies. But for the convenience of the estate the legatees are to wait till his affairs are arranged, and the property remitted'. Similarly, a direction to pay a legacy out of the assets in a particular country will not make it specific (c). Where a testatrix after directing her trustees to dispose of an estate directed that they should pay certain legacies out of the sale proceeds, the legacies were held to be demonstrative (d).

Exception to the rule. There is a class of cases where a gift of money out of the sale proceeds of land has been held to be specific. In such cases the testator has set apart the land as the source of payment of the legacy. Sir J Romilly says, where 'there is no gift whatever, except after the estate has been converted and the proceeds are in the hands of the trustees, who are then directed to apply them in a particular manner, the gift will be specific'. 'It would be a very different thing if the testator had directed a sale of the real estate and the proceeds apportioned amongst the various persons (e). In such a case there is not a gift of a sum in gross but of a sum as part of the produce of real estate. The legatee cannot claim it in any other shape than as part of the produce of the real estate (f)'.

146. (S 133) Where a will contains a bequest of the

When enumerated residue of the testator's property along with articles not deemed an enumeration of some items of property specifically bequeathed not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

The section. The section applies to the wills of Hindus etc. The section states that an enumeration of some items of property along with a bequest of the residue will not make the gift specific. As has been said by Lord Cranworth in a case, where the gift was preceded by the word *my* it would be very dangerous to hold that in a will where there is a gift of the residue and the testator unnecessarily chooses to enumerate some particular things in that residuary gift, such a circumstance was sufficient to constitute the things so enumerated specific gifts (g). Nor does the exception of certain gifts from the residue make it specific (h).

(a) *Raymond v Broadbent*, 5 Ves 197

(b) 8 Ves 617

(c) *Kirkpatrick v Kirkpatrick* cited in

Roberts v Puckock 4 Ves 158

(d) *Hodges v Grant* 4 Eq 143.

(e) *Evans v Dalton* 2 Brav 624

(f) *Duck v Edwards* 4 Hare 273

(g) *Swann v Glyn*, 9 Ves 403.

Patching v Barnett 51 L. J. Ch 74

(h) *Fiddling v Preston* 1 D. G. & J. 438 444, *Pickup v Atkinson* 4 Hare 624, 629

(i) *Re Onyx* 20 Ch D 676 aff'd 8 A. C. 812 *Bright v Hartnell* 23 Ch. D. 216, 222

The word 'Items' has been construed to refer to both movable and immovable property, but the word 'articles' to refer to movable property only (a)

The rule The rule is thus stated "A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist" (b) Thus a gift of 'all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements, stock and crop belonging to' A H estate was held not to amount to a specific gift of the furniture, *etc* (c) In *King v. George* (d), it is laid down as well settled that where a testator gives his property generally followed by an enumeration of particulars, the enumeration does not abridge or cut down the effect of the general words.

Exception The exception to the rule has been thus stated (e) "In some cases where there has been an enumeration of items coupled with a gift of the general personal estate, the particular items have been held not to be included in the general personal estate, but to be disposed of specifically All these cases depend on the construction of the particular will in which the gift is found" So a gift of the residue of an ascertained sum after payment of certain legacies has been held to be a specific legacy (f) How certain wills have been construed and the gifts of the enumerated items have been held to be specifically bequeathed see the cases cited below (g).

147 (S 134) Where property is specifically bequeathed

Retention, in form, of specific bequest to several persons in succession shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Illustrations.

(i) A, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C B is to enjoy the property as A left it, although, if B lives for fifteen years, C can take nothing under the bequest

(ii) A, having an annuity during the life of B, bequeaths it to C, for his life, and, after C's death, to D C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest

The section. The section applies to the wills of Hindus, *etc* In construing a will the Court is bound to give effect to the intention of the testator Where therefore property has been bequeathed specifically to two or more persons in succession, even if the property be of a wasting nature, the testator's intention is

(a) *Fernandez v Coelho* 84 I C 1029

(b) W. 756, 12 Ed *Taylor v Taylor*, 6 Sim 246, *Pickup v Atkinson*

4 Hare 628 *referred to*

(c) *Falser v Park* 3 Ch D 309

(d) 4 Ch D 435

(e) *Fitzwilliam v Kelly*, 10 Hare 266
274, *Mills v Brown*, 21 Beav 1,
Bethune v Kennedy 1 My & Cr

114, see *Re Green*, 40 Ch D 610, *Langdale v Esmond*, 4 Eq 576

(f) *Page v Leapingwell*, 18 Ves 463, *Walpole v Althrop* 4 Eq 37

(g) *Oakes v Strachey* 13 Sim 414, *Hood v Clapham* 19 Beav 93;
Re Barratt 84 L J Ch 345, (1925) Ch 550

that it should be enjoyed in specie by those persons, therefore the Court cannot interfere in the matter, although it may ultimately defeat the testators intention by the property deteriorating in character or decreasing in value (a) But no question of overriding the testators intention can arise where the gift is not specific Therefore the next section leaves the Court free to do not only what is just and equitable but what is also the best means of effectuating the testators intention, viz, enjoyment by two or more persons in succession (b)

The rule The rule laid down in the section has been thus stated (c) 'It is equally clear that, if a person gives certain property specifically to one person for life, with remainder over afterwards then although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as property endures, yet there is a manifestation of intention which the Court cannot overlook If a testator gives leasehold property to one for life with remainder afterwards he is the best judge when the remainderman is to enjoy These two kinds of cases are free from difficulty, but other cases of very great difficulty may occur'

Cases Where a testator gave the residue of his estate in trust to pay the annual proceeds to his wife for life and then to his nephews with a direction that they should take such part of the joint property as I am now holding held the property could not be converted and the widow was entitled to enjoy in specie (debts might be realized) (d) So, where a testator gave the residue of his estate to trustees to permit the rents etc, to be received by A for life and after his death by B and C when they attained 21 with power after the death of A to apply the rents etc towards the maintenance of B and C till they attained 21, held, the payment of rent during minority to B and C indicated that the property was to be kept in specie and not converted (e)

148 (S 135) Where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Illustration.

A, having a lease for a term of years bequeaths all his property to B for life and, after B's death, to C The lease must be sold the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to B for life At B's death the capital of the fund is to be paid to C

(a) *Pickup v Atkinson* 4 Hare 624 628

(b) *See Howe v Dartmouth* 7 Ves 137 cited under next sec

(c) *Pickering v Pickering* 4 My & Cr 259

Halgate v Jennings 24 Bear 623

Lord v Godfrey 4 Madd 455

Cockran v Cockran 14 Sim 249.

Bethune v Kennedy 1 My & Cr 114

(e) *Goodenough v Tienmams* 2 Bear 512

1 The section. The section applies to the wills of Hindus *etc* The rule laid down in the section is based on the decision in *Howe v Dartmouth* (a), where it was held that if a gift, not specific, be made to several persons in succession it was the duty of the Court to carry into effect the apparent intention of the testator. Therefore, if the property be of a wasting nature, it must be put in such a state as to allow of its being enjoyed by the legatees in succession in accordance with the testator's intention and for this purpose it might be invested in a permanent fund approved by the Court. This principle has come to be known as the rule in *Howe v Dartmouth*. The words in the absence of any direction to the contrary shew that the rule is subject to the intention of the testator.

2 The rule. The rule has been thus explained (b), 'where the will does not contain any direction that his (testator's) estate shall be converted, and does contain a gift not specific of a subject in its nature perishable, the Court will cause the estate to be converted and invested and the persons entitled in remainder may enjoy the investment after them'. But this rule cannot be resorted to when by so doing the Court would be acting at variance with the intention of the testator. 'The rule when acted upon is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him and Courts of Equity have always declined to apply this rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie' (c).

Accordingly, the rule "must be applied unless upon a fair construction of the will you find a sufficient intention that it is not to be applied the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case" (d).

Therefore the rule laid down in this section is the general rule which admits of exceptions when a contrary intention is indicated by the testator. The real question, then in all cases similar to that under consideration, is whether the testator has with sufficient distinctness indicated his intention that the property should be enjoyed in specie (e).

3 Contrary intention. Where a contrary intention is expressed by the testator the rule laid down in this section will not apply, but, as is the case under the previous section the property will be retained in the form left by the testator. Such contrary intention is more readily indicated where there is an absolute gift followed by an executory gift over (f). Such contrary intention may be indicated without the legacy being specific, and then the property should be retained in its existing estate (g).

- (a) 7 Ves 137
 (b) *Thurst v Thurst* 19 Eq 395
 (c) *Macdonald v Irine* 8 Ch D 101
 (d) *Macdonald v Irine*, 8 Ch D 101
 (e) *Macdonald v Irine* 8 Ch D 101.
 see also *Sa.* 341 345 346
 (f) *Re Bland*, (1899) 2 Ch 336.
 (g) *Holgate v Jennings* 24 Beav 623.
Thurst v Thurst 19 Eq 395.
Re Nicholson, (1909) 2 Ch. 111.
Re Rogen (1915) 2 Ch. 437

In *Macdonald v Irine* 8 Ch. D 101, *Re Game* (1897) 1 Ch. 231, *Re Wareham* (1912) 2 Ch 311 such intention was absent and therefore it was not necessary to keep the property in specie see *Jebb v Tugwell*, 20 Beav 84, *Brown v Gelatly* 2 Ch. 751, *Porter v Baddeley* 3 Ch. D 542, *Tickner v O'Neil* 15 Eq. 422.

4. Things consumed by use. A gift for life of things consumed by use, e.g. wines, is an absolute gift and therefore no interest in remainder can be created, but if they are given by way of a residuary legacy then they must be sold and the residuary legatee is entitled to the interest on investment (a). If the articles be not meant for use but form part of the assets of business the gift will not be absolute (b).

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

149 (S. 136) If there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

The section. The section applies to the wills of Hindus, etc. The section states that a specific legacy will not abate for the purpose of paying other legacies in case of deficiency of assets (c). This is one of advantages enjoyed by a specific legatee (d). But a specific legacy is liable to abate for the payment of debts in case of deficiency of assets (e).

CHAPTER XV.

OF DEMONSTRATIVE LEGACIES

150 (S. 137) Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that—

where specified property is given to the legatee, the legacy is specific ;

where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations.

(a) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific, the legacy to C is demonstrative

(a) *Randall v. Russell*, 3 Mer 194.
Antie v. Andie, 1 Coll 693.
 (b) *Phillips v. Bech*, 32 Bear 25.
Cochrane v. Harrison, 13 Eq 432.

(c) *Re Wedmore*, (1907) 2 Ch. 277.
 (d) *Re Compton* (1914) 2 Ch 119.
 (e) See s 330 *Stech v. Tillington*.
 2 Ves sen 567, 564

(ii) A bequeaths to B—

"ten bushels of the corn which shall grow in my field of Green Acre" .

"80 chests of the indigo which shall be made at my factory of Rampur "

"10,000 rupees out of my five per cent promissory notes of the Government of India"

an annuity of 500 rupees "from my funded property" ,

"1 000 rupees out of the sum of 2,000 rupees due to me by C

an annuity, and directs it to be paid "out of the rents arising from my taluk of Ramnagar "

(iii) A bequeaths to B—

"10,000 rupees, out of my estate at Ramnagar, ' or charges it on his estate at Ramnagar

"10,000 rupees, being my share of the capital embarked in a certain business "

Each of these bequests is demonstrative

1. The section. The section applies to the wills of Hindus, *etc.*

2 Demonstrative and other kinds of legacies. "By a demonstrative legacy we mean a gift which the testator intends to be paid in the first instance out of the fund which he designates as the fund for the payment of it, but not to the exclusion of its being paid out of any other fund if that which he intended to be the primary source of payment is not forthcoming By a general legacy we understand a legacy with regard to the payment of which the testator expresses no intention beyond the intention that it should be paid The words specific, demonstrative and general, do not show some quality inherent in the legacy but "simply indicate a particular intention of the testator, and what the Court does is, having ascertained what the intention of the testator was, to give effect to that intention ' (a)

There are therefore three classes of gifts or legacies First, a general gift in which no special fund is pointed out for payment, secondly, a specific gift payable out of a particular fund alone, thirdly, a gift where a particular fund is pointed out as primarily applicable, but where the gift is not to fail by the failure of the particular fund (b)

In case of a demonstrative legacy there is "a clear gift, but a particular fund is pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable' (c), in the absence of a direction to the contrary by the testator (d) In every case of demonstrative legacy, therefore, there is some specified property which is demonstrated by the testator as that primarily applicable to pay the legacies The property specified may, however, be the subject of a specific legacy itself, *e g.*, where a testator makes a specific gift of his share in the capital of the partnership but excepts from that certain pecuniary bequests These bequests are demonstrative and primarily payable out of the capital, but in case of deficiency to be made good out of the general

(a) *Re Young* 52 L. T. 754
(b) *Page v Hush*, 1 H & M 663
671, see *Re Walford*, 1912 A C
658.

(c) *Page v Hush*, 1 H & M 663,
668; see Explanation to the sec
(d) *Chinnam v Tadibanda* 29 M 155

estate of the testator (a) A demonstrative legacy has been briefly described as a general legacy with a particular fund pointed out to satisfy it (b)

3. **Distinction between demonstrative and other legacies.** A demonstrative legacy, it has been said, is in the nature of a specific legacy, as of so much money, with reference to a particular fund for payment, it is so far general and, differs so much in effect from one purely specific that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets (S 329), yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets (c) A specific legacy is not liable to abate for the payment of debts, when the assets are sufficient to answer the debts and the specific legacy (see S 330), but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable (S 329) A specific legacy is liable to ademption, but a demonstrative legacy is not (Ss 152, 153) Lastly, a specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death (d)

4 **Intention the test.** Whether a legacy is demonstrative or not depends on the intention of the testator 'There are many cases in which though a legacy be charged upon a particular fund, it does not fail by the failure of the fund, which are commonly called demonstrative legacies, but these all proceed upon the construction showing a general intent' (e).

This intent has been described as 'a fixed, independent separate, distinct intent to give the legacy, the particular property out of which it was to be paid being a secondary thought' (f) Whether a legacy is demonstrative or specific, therefore, depends on this, viz., "whether the manner in which the sum is mentioned turns it to a pecuniary legacy, or as the civilians call it, a demonstrative legacy, that is a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it, or whether it be what they call a *legatum nominis* or *legatum debiti*' (g) What the Court has therefore to determine is the intention of the testator upon a construction of the whole will (h) In *Williams v Hughes* (i) certain legacies were held to be specific and others demonstrative, because in respect of the latter the Court discerned an intention that they should be paid at all events As to the difficulty of determining the intention of the testator whether on a failure of a particular fund the legacy is payable out of the general assets, see cases cited below (j)

- (a) *Bevan v All Genl*, 4 Giff 361.
Chinnam v Tadikonda 29 M 155
 See S 151
- (b) *Ashburner v M Gulre* 2 Bro C C 105
- (c) *Tempest v Tempest* 7 D G M & G 470 473, on app 26 L J Cl 501
- (d) *Mu' v Smith*, 1 Dr & Sm 224 210
Cred v Cred 11 Cl & F 471.

- (f) *Mann v Copland* 2 Madd 223
- (g) *Ashburner v M Gulre*, 2 Bro C C 105
- (h) *Deane v Test* 9 Ves 146
- (i) 24 Beav 474
- (j) *Vickers v Pound* 6 H L C 845,
 see *Re Platt* (1894) 1 Ch 471.
Higgins v Dawson 1902 A C 1
Fream v Dowling 20 Beav 624

5. Cases. Where a testatrix gave certain legacies "out of my allowance from *wasika* and notes," etc, it was held that the words of the gift were large enough to charge the annuities and stipends in question and also the rest of her movable property. In a more restricted sense the gift was to be regarded as a demonstrative legacy and was payable out of the testatrix's general estate, in the event of the failure of the particular fund pointed out for payment (a) Where a testatrix gave certain legacies and directed them to be paid out of a certain fund, *held*, the legacies were not specific so as to fail if the fund failed, but demonstrative bequests (b). In *re Walford* (c) the testator was entitled to a certain sum of money under the will of his mother after the death of his father who had a life interest in the same. The testator who predeceased his father gave to his sister £10,000 to be paid out of the estate inherited by him from his mother and the residue of the estate to others, *held*, the legacy was demonstrative. A gift of an annuity of £100 by will charged upon leasehold property has been held to be demonstrative and to have priority over legacies in respect of the property charged and it would not have failed if the property had been disposed of by the testatrix (d).

6. Explanation Gifts of money out of a particular stock have been held to be demonstrative (e), so also gifts out of a debt (f), unless the intention be to give the identical stock or share or part thereof (g), or a part of the debt (h) In case of a legacy of a part of a debt the question to be determined is whether the testator intends to bequeath the debt itself or the money thus invested In the former case the legacy will be specific, in the latter, demonstrative (i). A stock legacy payable out of stock of the same denomination is specific but a money legacy payable out of stock is not specific but demonstrative (j) In *Hodges v Grant* (k) legacies payable out of the sale proceeds of real estate were held to be demonstrative and therefore on a deficiency of that estate to be paid out of the general estate of the testatrix But in *Newbold v. Roadknight* (l) it was laid down that a gift to one of a sum of money, part of the produce of real estate directed to be sold followed by a gift of the residue of the purchase money to others, was substantially a gift of the estate and would therefore have adeemed if the testator had sold the estate in his lifetime A gift of £400 invested in the Belgravian Dairy Company where the testatrix had 500 £1 shares has been held to be a gift of the 400 shares of the Company and not of £400 (m) A charge on real estate (see illust iii) creates an interest in land as distinguished from an estate in it (n).

- (e) *Sahib Mirza v Umda Khanam*, 19 L. A. 83, 19 C. 444
 (b) *Vickers v Pound*, 6 H. L. C. 885.
 (c) 1912 A. C. 658
 (d) *Livesay v Redfern*, 2 Y. & C. C. Ex. 90
 (e) *Kirby v. Potter*, 4 Ves. 748; *Deane v. Test*, 9 Ves. 146, 152.
 (f) *Sparrow v Josselyn*, 16 Beav. 135, *Campbell v. Graham* 1 Russ & M. 453.
 (g) *Morley v. Bird*, 3 Ves 628, *Hosking v Nicholls*, 1 Y. & C. C. C. Ex. 478 J. 1039 sq 7 Ed.

- (h) *Nelson v Carter*, 5 Sim 530; *Davis v Morgan* 1 Beav. 405.
 (i) *Sidebotham v Watson*, 11 Hare 170
 (j) *Mullins v Smith*, 1 Dr & Sm. 204.
 (k) 4 Eq. 140
 (l) 1 Russ & M. 677; *Page v Leapingwell*, 18 Ves. 463 J. 1034
 (m) *Re Buller*, 74 L. T. 466
 (n) *Re Thomas*, 34 Ch. D. 165, the illust. follows the case of *Creed v. Creed*, 11 Cl. & F. 491, see next sec.

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4. Intention the test. Whether a legacy is demonstrative or not depends on the intention of the testator 'There are many cases in which though a legacy be charged upon a particular fund, it does not fail by the failure of the fund, which are commonly called demonstrative legacies, but these all proceed upon the construction shewing a general intent' (e)

This intent has been described as 'a fixed, independent separate, distinct intent to give the legacy, the particular property out of which it was to be paid being a secondary thought' (f) Whether a legacy is demonstrative or specific, therefore, depends on this viz, "whether the manner in which the sum is mentioned turns it to a pecuniary legacy, or as the civilians call it, a demonstrative legacy, that is a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it, or whether it be what they call a *legatum nominis* or *legatum debiti* (g) What the Court has therefore to determine is the intention of the testator upon a construction of the whole will (h) In *Williams v Hughes* (i) certain legacies were held to be specific and others demonstrative, because in respect of the latter the Court discerned an intention that they should be paid at all events As to the difficulty of determining the intention of the testator whether on a failure of a particular fund the legacy is payable out of the general assets, see cases cited below (j)

- (a) *Becan v All Genl*, 4 Giff 361,
Chinnam v Tadikonda, 29 M 155
See S 151
(b) *Ashburner v M Guire* 2 Bro C C
108
(c) *Tempest v Tempest*, 7 D G M
& G 470 473, on app 26 L J
Ch 501
(d) *Mullins v Smith* 1 Dr & Sm
204, 210
Creed v Creed 11 Cl & F 491.

- (f) *Mann v Copland* 2 Madd 223
(g) *Ashburner v M Guire* 2 Bro C C
108
(h) *Deane v Test*, 9 Ves. 146
(i) 24 Beav 474
(j) *Vickers v Pound* b H L C. 885,
see *Re Pratt* (1894) 1 Ch 491.
Higgins v Dawson 1902 A C
1 *Fream v Dowling* 20 Beav
624

5 Cases Where a testatrix gave certain legacies out of my allowance from *wasika* and notes etc it was held that the words of the gift were large enough to charge the annuities and stipends in question and also the rest of her movable property In a more restricted sense the gift was to be regarded as a demonstrative legacy and was payable out of the testatrix's general estate in the event of the failure of the particular fund pointed out for payment (a) Where a testatrix gave certain legacies and directed them to be paid out of a certain fund held the legacies were not specific so as to fail if the fund failed but demonstrative bequests (b) In *re Walford* (c) the testator was entitled to a certain sum of money under the will of his mother after the death of his father who had a life interest in the same The testator who predeceased his father gave to his sister £10 000 to be paid out of the estate inherited by him from his mother and the residue of the estate to others held the legacy was demonstrative A gift of an annuity of £100 by will charged upon leasehold property has been held to be demonstrative and to have priority over legacies in respect of the property charged and it would not have failed if the property had been disposed of by the testatrix (d)

6 Explanation Gifts of money out of a particular stock have been held to be demonstrative (e) so also gifts out of a debt (f) unless the intention be to give the identical stock or share or part thereof (g), or a part of the debt (h) In case of a legacy of a part of a debt the question to be determined is whether the testator intends to bequeath the debt itself or the money thus invested In the former case the legacy will be specific in the latter demonstrative (i) A stock legacy payable out of stock of the same denomination is specific but a money legacy payable out of stock is not specific but demonstrative (j) In *Hodges v Grant* (k) legacies payable out of the sale proceeds of real estate were held to be demonstrative and therefore on a deficiency of that estate to be paid out of the general estate of the testatrix But in *Newbold v Roadknight* (l) it was laid down that a gift to one of a sum of money part of the produce of real estate directed to be sold followed by a gift of the residue of the purchase money to others was substantially a gift of the estate and would therefore have adeemed if the testator had sold the estate in his lifetime A gift of £400 invested in the Belgravian Dairy Company where the testatrix had 500 £1 shares has been held to be a gift of the 400 shares of the Company and not of £400 (m) A charge on real estate (see illust iii) creates an interest in land as distinguished from an estate in it (n)

- (e) *Sahib Mirza v Umda Khanam* 19 I A 83 19 C 444
 (b) *Vickers v Pound* 6 H L C 885
 (c) 1912 A C 658
 (d) *Llocau v Redfern* 2 Y & C C Ex 90
 (e) *Kirby v Potter* 4 Ves 748 *Deane v Test* 9 Ves 146 152
 (f) *Sparrow v Josselyn*, 16 Beav 135 *Campbell v Graham* 1 Russ & M 453
 (g) *Morley v Bird* 3 Ves 628 *Hosking v Nicholls* 1 Y & C C C Ex 478 J 1039 sq 7 Ed.

- (h) *Nelson v Carter* 5 Sim 530, *Davis v Morgan* 1 Beav 405
 (i) *Sidbotham v Watson* 11 Hare 170
 (j) *Mullins v Smith* 1 Dr & Sm 204
 (k) 4 Eq 140
 (l) 1 Russ & M 677, *Page v Leaping well* 18 Ves 463 J 1034
 (m) *Re Buller* 74 L T 416
 (n) *Re Thomas* 34 Ch D 165 the illust follows the case of *Creed v Creed* 11 CL & F 491 see next sec.

7. Construction. For a case of construction of a will to determine whether a legacy is demonstrative or specific, see *Gillaume v. Adderley* (a)

151. (S 138). Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund and, so far as the residue shall be deficient, out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1,500 rupees, of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

The section. The section applies to the wills of Hindus, etc. It lays down two rules, first, where a specific legacy and a demonstrative legacy are to come out of the same fund, the former is to be paid first, secondly, if the residue of the fund prove insufficient to pay the demonstrative legatee, then the deficiency is to be made good out of the testator's general assets. Where a testatrix after giving certain specific and pecuniary bequests gave certain charitable legacies, *held*, these were demonstrative legacies, payable after payment of debts, funeral and testamentary expenses and specific legacies, but in priority to other legacies and, in case of deficiency, could be paid out of the general assets (b). Where a testator gave a freehold estate and certain specific chattels to his wife and also an annuity for life charged upon other freehold estates and several pecuniary legacies to others to be paid out of the residue of his personal estate but in case of deficiency out of his real estate, on the personal estate proving insufficient to pay debts and legacies, and also the real estate to pay the annuity and legacies *held*, the annuity being a specific gift was payable out of the real estate in priority to other legacies. The other legacies did not become specific simply because they were payable and were to issue out of the proceeds of real estate (c). On a failure of the fund out of which the testator has directed the payment to be made, a demonstrative legacy is payable out of the testator's general estate (d).

(a) 15 Ves 334.
(b) *Tempest v. Tempest*, 7 D G M & G 470.

(c) *Creed v. Creed*, 11 Cl & F 491.
(d) See S 329. For cases see note S 150.

CHAPTER XVI.

OF ADEPTION OF LEGACIES.

152 (S. 139) If anything which has been specifically

bequeathed does not belong to the testator
 at the time of his death, or has been converted
 into property of a different kind, the legacy is adeemed;
 that is, it cannot take effect, by reason of the subject-matter
 having been withdrawn from the operation of the will.

Illustrations.

(i) A bequeaths to B—

"the diamond ring presented to me by C",

"my gold chain".

"a certain bale of wool"

"a certain piece of cloth".

"all my household goods which shall be in or about my dwelling house in M Street in Calcutta, at the time of my death"

In his life time,—

sells or gives away the ring

converts the chain into a cup,

converts the wool into cloth.

makes the cloth into a garment

takes another house into which he removes all his goods

Each of these legacies is adeemed.

(ii) A bequeaths to B—

"the sum of 1,000 rupees in a certain chest"

"all the horses in my stable"

At the death of A, no money is found in the chest, and no horses in the stable.
 The legacies are adeemed.

(iii) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned. The legacy is adeemed.

1. The section. The section applies to the will of Hindus, *etc.* The section explains what is meant by adeption of a legacy. Adeption means the failure or loss of a *specific legacy* through the subject matter of the gift ceasing to exist in species at the testator's death. The word, in its literal sense, means 'taken out of will,' the law regards in such cases the legacy to be taken out of the will. There is, however, another sense in which the term is used, *viz.*, as meaning satisfaction or extinguishment of a general legacy given by a will (a). The effect of adeption in the former sense, is to withdraw from the legatee all benefits attached to the legacy as accessories, *i.e.*, as ancillary gifts, but not a gift which is not accessory to the legacy adeemed (b)

(a) J 1121, 7 E1

(b) *Peters v. Cole*, 27 L J Ch. 825.

2 Specifically bequeathed These words show that it is a specific legacy only that is liable to ademption. It is stated in the next section that the rule has no application to demonstrative legacies. The reason is that a specific legacy is payable *in specie*. It is obvious that such a legacy cannot be paid if its subject matter changes its form or ceases to exist in the same or substantially the same form on the testator's death or ceases to form part of the testator's estate (a). A similar object procured or provided for the legatee as in the case of a general legacy will not be a gift of the identical object that the testator intended to give to the legatee. In such a case therefore the legacy is deemed to be revoked by ademption. But if the change be in name and form only and not in substance there will be no ademption (b).

3 Does not belong, etc The property specifically bequeathed may cease to belong to the testator at the time of his death by reason of—

(i) sale by the testator of the object specifically bequeathed by the will (c) or by order of Court (d)

(ii) destruction *e.g.* where a testator made a specific gift of certain chattels to A insured them and took them out on an Indian voyage but the ship was lost and the testator and his goods perished the legatee had it was held no right to the insurance money recovered by the executors (e)

(iii) any other disposition made by the testator during his life time *e.g.* where a specific legacy given by way of a trust created by a will is disposed of subsequently by creating a trust of the same by deed. The will even if confirmed by a later codicil does not revive the specific legacy, but the codicil only confirms the will as it stood *ie* altered by the ademption of the specific legacy (f). Where there was a bequest of £1000 stock in a certain Company which was paid off by the Company and reinvested by the testator's desire in other securities held the specific legacy was deemed (g)

(ii) a contract for sale. A contract for sale of land entered into after execution of a will has been held sufficient to cause ademption (h). The contract must be a binding contract (i). The legatee however is entitled to the rents issues *etc.* of the property accruing due between the death of the testator and the completion of the purchase (j).

(v) receipt of the money when the subject matter of the specific legacy has been a debt due to the testator (l).

- (a) *Barker v. Rayner* 5 Madd 203
 (b) *Oakes v. Oakes* 9 Hare 666 *Re Slater* (1907) 1 Ch 665, *Re Kuypers* (1925) Ch 244 See below
 (c) *Asburner v. M G* 2 Bro C C 103
 (d) *Re Freer* 22 Cl 103
 (e) *Durant v. Fend* 343
 (f) *Cowper v. Mart* 3
Harrison v. Jacks 2,
Le Gilce v. Li 30

see McC
 7 D 101 *M*
 Ch D 92 *J*
 v *Watts* 17
Settlement 34
 v *Bea*
Bagot's
 772

4. At the time of his death. Ademption takes place when the subject matter of a legacy ceases to form part of the testator's estate at the time of his death. There will, therefore, be no ademption if the sale be after the testator's death. Thus, where a testator, having given a general power of attorney to sell out particular stock, made a specific bequest of the same and afterwards drew bills on the attorneys and requested them to dispose of a part of the stock to repay themselves, the bills were paid, soon after the testator died, but without knowing it the attorneys sold a part of the stock, *held*, the legacy was not adeemed, because not acted upon during the testator's lifetime (a). As Lord Thurlow has observed, "the only rule to be adhered to is to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for if it did not, then there must be an end of the bequest, and the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion" (b). At the same time it should be noted that where a third person against the will and authority of the testator and without his knowledge converts the subject-matter of the specific legacy there will be no ademption (c). An inconsistent bequest by a later codicil may cause a specific legacy given by an earlier will to be adeemed (d).

The words, 'at the time of his death', indicate that it is when a thing specifically bequeathed ceases to belong to the testator at the time mentioned that there will be ademption. These words therefore may be regarded as fixing the time limit for the operation of the principle of ademption. In as much as a will is construed to refer to property which the testator leaves at the time of his death, unless a contrary intention shall appear by the will, additions to stock made by the testator will pass under a bequest of the stock (e). So also if the testator has disposed of a part of the stock only the residue will pass (f), similarly, in case of gifts of land (g). A release of certain specified debts and "all other moneys due from him to me" operates as a release of debts incurred subsequent to the date of the will (h). So a bequest of the testator's interest in business passes the entire interest subsequently acquired by him (i).

The rule, as has been observed, is subject to a contrary intention of the testator (j). Accordingly it has been held in some cases that additions to the gift thereby enhancing its value would furnish sufficient evidence of a contrary intention (k). But authorities are not lacking in support of a contrary view (l). In such cases, therefore, the first question the Court is to ask is—What does the will mean (m)? Where, however, there is an express reference to the property left by the testator at the date of his will, *e.g.*, by the use of the word

(a) *Harrison v Asher*, 2 D G & S 436.

(b) *Humphries v Humphries*, 2 Cox 185 W 862 12 Ed

(c) *Jenkins v Jones*, 2 Eq 323

(d) *Kermode v Macdonald*, 1 Eq 457

(e) *Goodlad v Burnett*, 1 K & J 347

(f) *Re Slater*, (1906) 2 Ch 480; (1907) 1 Ch 665

(g) *Castle v Fox*, 11 Eq 552

(h) *Ex verelt v Everett*, 7 Ch D 428

(i) *Re Russell*, 19 Ch D 432

(j) *Emuss v Smith*, 2 D G & S 722

(k) *Re Gibson*, 2 Eq 669, *Re Parlat & Lamb*, 30 Ch D 50, 55

(l) *Castle v Fox*, 11 Eq 542, *Re Evans*, (1909) 1 Ch 784

(m) *Sidney v Sidney*, 17 Eq 65, 68

'now' there is not much difficulty of construction. After-acquired properties will be excluded (a)

5. Misdescription Mere misdescription will not operate as ademption if it appear clearly from the will that the testator intends to make a specific gift of something which he possessed at the time, but has wrongly described the thing in his will (b)

6. Converted into property, etc. The emphasis is on the word 'different'. Not only must there be a change, but in order to cause ademption the change must be substantially different, *eg*, of debentures into debenture stock (c) or a change in the Company (d). Thus, it has been said that a legacy of a specific thing in possession, *eg*, a gold chain, or a bale of wool, or a piece of cloth is adeemed either by the testator selling or otherwise disposing of it in his lifetime or by changing its form, *eg*, by converting the gold chain into a cup, or the wool into cloth, or making the piece of cloth into a garment (e). But a change in name or form only will not cause ademption, *eg*, where the original shares specifically bequeathed have been sub divided (f), or where there has been a mere reconstruction of a Company even after dissolution (g). In *re Gray* (h), on conversion of an unlimited joint stock company into one of a limited liability company accompanied by a change in the valuation of the shares, a legacy was held to fail not because of ademption but because it became impossible to ascertain what amount should be set apart for the legatees

7. Ademption and revocation (i) "Ademption is a mode of implied revocation. The distinction between ademption and revocation chiefly consists in the fact that, 'although a will can be neither wholly nor partly revoked or abandoned by words parol evidence is admissible to establish either a total or a partial ademption of a legacy' (Tayl. Ev. S. 1048). To revoke is to destroy the operative power of the instrument by some act done with the intention of destroying, whereas to adeem is not to destroy such power but to withdraw the subject of gift from the operation of it, thereby rendering the power inoperative with respect to any particular gift. In ademption again, it is immaterial whether or not the testator intended to adeem the gift [*Ashburner v Mac Guire*, 2 Bro. C. C. 110]. Thus the question is, not one of construction of the will, as it is in revocation, but of construction of an act in no respect testamentary' (Bigelow 369).

8. Ademption and power of appointment. An appointment under a testamentary power is adeemed by subsequent dealing with the appointed property and there is no distinction for this purpose between a general and a special

- (a) *Re Champion* (1893) 1 Ch. 101;
Cole v Scott, 16 Sim. 259. J. 392.
 (b) *Re Nottage* (1895) 2 Ch. 657.
Re Herring (1908) 2 Ch. 493.
 (c) *Le Lane*, 14 Ch. D. 856. W. 766,
 862.
 (d) *Re Slater*, (1906) 2 Ch. 480,
 (1907) 1 Ch. 665.

- (e) *Ashburner v Mac Guire*, 2 Bro. C. C. 108.
 (f) *Re Clifford*, (1912) 1 Ch. 29. W. 863.
 (g) *Re Leeming*, (1912) 1 Ch. 828.
 (h) 36 Ch. D. 205. J. 1043.
 (i) M. 500.

power therefore an appointment fails if at the date the instrument comes into operation there is no property on which the power can operate (a)

9 **Withdrawn** A mere unexecuted intention to change the state of a fund which the testator intended to revoke but which intention in fact was never carried into execution cannot in any sense be considered as an ademption (b)

153. (S. 140) A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator

Non ademption
of demonstrative
legacy

The section The section applies to the wills of Hindus etc. The section lays down the rule that a demonstrative legacy is not adeemed like a specific legacy by its subject matter ceasing to exist at the time of the testator's death but is payable in such a case out of the general estate of the testator. The reason for this rule has been given thus—"The legacy (i.e. a demonstrative legacy) is not so specific and so connected with the fund as to fail if there is no such fund it appearing that there was a fixed independent separate distinct intent to give the legacy the particular property out of which it was to be paid being a secondary thought (c). Accordingly an annuity payable out of the rents of a house was held to be payable out of the general estate the devise of the house failing. As has been observed there are many cases in which though a legacy be charged upon a particular fund it does not fail by the failure of the fund, which are called demonstrative legacies but these all proceed upon the construction showing a general intent (d). Therefore it follows that a demonstrative legacy is to be paid in the first instance out of the fund pointed out but the testator for that purpose, but that is not the only fund for that purpose for if that fail such legatees are entitled to call upon the executors to provide from the testator's estate a sufficient sum for payment of their legacies (e). No doubt in case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended but that rule is of course, subject to any direction to the contrary by the testator (f).

Ademption of
specific bequest of
right to receive
something from third
party

154 (S. 141). Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed

- (a) *Re Dowsett* (1901) 1 Ch 398
Beddington v Baumann 1903 A C 13, but see *Re Johnstone's Settlement* 14 Ch D 162
(b) *Basan v Brandon* 8 Sim 171
see *Harrison v Ashar* 2 D G & S 436
(c) *Mann v Copland* 2 Madd 223

- (d) *Creed v Creed* 11 Cl & F 491
Fowler v Willoughby 2 Sim & St 324, see *Smith v Fitzgerald* 3 V & B 2 cited under next sec
(e) *Vicke v Pound* 6 H L C 885
Sahib Mirza v Umda Khanam 19 I A 83 19 C 444
(f) *Chinnam v Tadkonda* 29 M 155

Illustrations.

(i) A bequeaths to B—

"the debt which C owes me"

'2 000 rupees which I have in the hands of D'

"the money due to me on the bond of E"

"my mortgage on the Rampur factory"

All these debts are extinguished in A's lifetime, some with and some without his consent. All the legacies are adeemed

(ii) A bequeaths to B his interest in certain policies of life assurance A in his lifetime receives the amount of the policies The legacy is adeemed

1 The section. The section applies to the wills of Hindus *etc*

2. The rule The rule of ademption as laid down in this section has been stated thus—"If a man having a debt due to him leaves it by his will to somebody else, and afterwards in his lifetime receives that debt the legacy is adeemed" (a) In such a case there is nothing upon which the words of the gift can operate (b) 'The principle of Ademption by receiving the thing given is certainly, that the thing given no longer exists, for if after the receipt of it, it could be demanded that would be converting it into a pecuniary, instead of a specific legacy It is said, this is pecuniary, as it is a bequest of the money to be received But that is the case of every bequest of a debt' (c)

The bequest must be specific in order that the section may apply (See S 162) It has been seen under the preceding section that a demonstrative legacy is not so adeemed Therefore, where legacies were given out of a debt which the Nabob of Arcot owed to the testator, the legacies were held to be demonstrative, because 'The testator had not directed the debt of the Nabob to be divided among the legatees in a given proportion, but gives to each a precise sum, to be paid out of the debt whenever it should be recovered' (d) In such a case the demonstrative legatees can claim a preference for payment out of the debt before other legatees, but the gifts not being exactly specific, if the debts had ceased to exist there would have been no ademption (e) Where, however, a testator bequeaths a debt but receives payment of it during his lifetime and deposits the amount in a Bank, whether along with his own money or not, he deals with it as his money and the legacy, if specific, is adeemed (f)

In *Ashburner v M Guire* (g) a legacy of 'my £1000 East India Stock' was held adeemed by the sale of the stock by the testator. It was laid down that there was no difference between a voluntary payment and a payment on demand The receipt of the debt by the testator caused ademption of a legacy In an old case a legacy was held to be adeemed even though the debt were realised under compulsion (h) But a specific legacy of certain shares given by the testator to

- (a) *Manton v Tabols* 30 Ch D 92,
Moore v Moore 29 Bear 496
 distinguished
 (b) *Clark v Brown* 2 Sm & G 524
 (c) *Fryer v Morris* 9 Ves 360]
 1034 7 Ed
Smith v Fitzgerald, 3 V & B 2

- (e) *Roberts v Pocock* 4 Ves 150.
Acton v Acton, 1 Mer 178
 (f) *Manton v Tabols*, 30 Ch D 92
 (g) 2 Bro C C 108 cited in *Re*
Bridle 4 C P D 336
 (h) *Humphries v Humphries*, 2 Cox 185

his son was held not adeemed where creditors of the testator had resorted to them for the satisfaction of their debts. The legatee was held entitled to compensation for the amount of loss sustained by him to be ascertained at the date of payment of the legacy (a)

Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed

155 (S. 142) The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received

Illustration.

A bequeaths to B "the debt due to me by C." The debt amounts to 10,000 rupees. C pays to A 5,000 rupees the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

The section. The section applies to the wills of Hindus, etc. The section states that the same principle will apply where a testator receives not the whole, as in the last section, but a part of the debt due to him. It is only the part that remains in specie over which the gift can operate. That part, therefore, is not adeemed but goes to the specific legatee.

Cases. Where a testator bequeathed a legacy to A of a debt due on a bond from the husband of A who became bankrupt and the testator received certain dividends, *held*, that the legacy was diminished to the extent of the dividends received by the testator, but the legatee was entitled to the balance (b). A bequest to A, of 'all balances of profits due from the said firm of which I am a partner, has been held to be adeemed *pro tanto* by drawings made before his death and effect was given to the legacy only to the extent of the sum still remaining due from the partnership concern (c).

156 (S. 143). If a portion of an entire fund or stock is specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Ademption *pro tanto* by testator's receipt of portion of entire fund of which portion has been specifically bequeathed

Illustration

A bequeaths to B one half of the sum of 10,000 rupees due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

The section. The section applies to the wills of Hindus, etc. The section states how the general rule of ademption as laid down in S. 154 is to be applied in practice under a particular set of circumstances. The distinction between this

(a) *Re Broadwood* (1911) 1 Ch 277.
(b) *Ashburner v AGGuite*, 2 Bro C.C.

10^a
(c) *Aston v Wood*, 43 L. J Ch 715

The section The section applies to the wills of Hindus, etc. In order that the section may apply two conditions must be complied with (i) there must be a condition, that is, an agreement, to replace the stock, and (ii) it must be replaced accordingly. The stock must be replaced before the testator's death, otherwise the thing bequeathed will have ceased to exist or rather will have changed its nature from a stock into a debt.

166 (S 153.) Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

Stock specifically bequeathed sold but replaced, and belonging to testator at his death

The section The section applies to the wills of Hindus etc. The section is based on the decision in *Avelyn v Ward* (a) where Lord Hardwicke observed that if a testator disposed of stock specifically bequeathed but replaced it during his lifetime there should be no ademption.

The reason is that just as selling of stock is presumed to be evidence of a change in the testator's intention similarly buying back or replacing the stock is evidence of the testator's intention that the testator should have it again (b). In *Drinkwater v Falconer* (c) it was held that a legacy was not adeemed if a testator replaced a sum upon the same fund again. But replacing by something different however slight the difference will not prevent ademption (d). So where 1000 railway shares specifically bequeathed to a legatee were sold by the testator who bought bit by bit a number of other shares or stock, held the legacy was adeemed as there was nothing to shew that the specific bequest having adeemed, the testator has replaced the identical thing (e). In *Sidney v Sidney* (f) a testator after reciting that the sum of £1440 was due from his son released him from the payment of any interest upto the time of his (testator's) death. The debt was repaid by the son but he was indebted to the extent of £1291 to the testator at the time of his death held the release of interest was equivalent to a specific legacy of the interest due on the debt existing at the time of the will which was adeemed by the repayment of the loan. The release therefore did not extend to the new loan.

Revival of adeemed legacy A specific legacy adeemed by sale of the subject of the bequest is not revived by a codicil after such sale confirming the gifts by will (g). Though a codicil brings the will to the date of the codicil it does not necessarily make the will operate as if it had been originally made at the date of the codicil (h).

(a) 1 Ves sen. 420 426
(b) *Partridge v Partridge* Cas temp Talb 227 cited in *Avelyn v Ward* 1 Ves sen 420
(c) 2 Ves sen 623
(d) *Pattison v Pattison* 1 My & K 12.
(e) *Re Gibson* 2 Eq 669

(f) 17 Eq 65
(g) *Macdonald v Irvine* 8 Ch D 101.
Montague v Montague 15 Beav 565
(h) *Hopwood v Hop* H L C 725

CHAPTER XVII.

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF
A BEQUEST.

167 (S.154.) (1) Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

Non-liability of
executor to exonerate
specific legatees.

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section

Illustrations

(i) A bequeaths to B the diamond ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.

(ii) A bequeaths to B a zamindari which at A's death is subject to a mortgage for 10,000 rupees; and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to his charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

1. The section. The section applies to the wills of Hindus, etc. It is the general estate of the testator that is, in the first instance, liable for the debts of the testator, but this section introduces an exception to that rule in case of specific legacies which are subject to encumbrances.

2. History of the rule. Formerly in England if a specific legacy was subject at the death of the testator to any pledge, lien or encumbrance created by the testator himself or by any person under whom he claims the specific legatee was entitled to have the encumbrance redeemed by the executor out of the general assets of the testator (a), if the executor failed to perform that duty then he was to compensate the legatee to the amount of the legacy (b). The same rule applied

(a) *Fitzwilliams v. Kelly*, 10 Hare 266,
Ashburner v. Macguthrie, 2 Bro. C. C.

108, 113
(b) *Knight v. Davle*, 3 My & K. 358

to charges upon real property (a) Both rules, however, were subject to the intention of the testator to the contrary (b)

Under the Real Estate Charges Act (17 & 18 Vict c 113) commonly known as the Locke King's Act, and the Explaining Act of 1877 (40 & 41 Vict c 34) the heirs or devisees of encumbered lands of any tenure were not entitled to have the encumbrances discharged out of any other estate of the testator or intestate (c), unless any contrary or other intention was signified Sub S (1) of this Act is based on these Statutes

The law as regards personalty has also been changed by a recent statute (d) So that the position now in England is the same as in this country, viz, that a legatee or devisee, whose gift has been pledged or charged by the testator, is no longer entitled to compensation where the testator 'has not by will deed or other document signified a contrary intention'

3. Contrary intention Under Locke King's Act (17 & 18 Vict c 113) the general estate or personalty was not liable for encumbrances when the testator or intestate "shall not by his will, or deed, or other document have signified any contrary or other intention' Under this statute, a general direction to pay debts out of the personal estate or a particular fund was held sufficient evidence of a contrary intention to take the case out of the operation of the statute (e) The Explaining Act of 1867 did away with this interpretation by requiring the contrary intention "to be signified by a charge or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate' The latter statute thus requires express or implied reference to the mortgage debts in unmistakable language "A charge of debts on personalty or on realty does not now sufficiently indicate an intention to exonerate the mortgage estate" (f) As has been said "mortgage debts should be borne by mortgaged assets" (g) This applies to all specific legacies Sub-section (2) is similar in effect to the Explaining Act The contrary intention must be unequivocally expressed (h)

Where a testator directed to pay debts, etc., "except charges and mortgage debts, if any, on property specifically devised, out of the residue, held, there was a clear evidence of contrary intention and mortgage debts, other than those on property specifically devised, were to come out of the residue (i), but a direction to pay a mortgage debt does not include an unpaid vendor's lien (j) It is not necessary that the debt should be referred to as a mortgage debt but it must be sufficiently described to identify it as being the particular debt which happens to be secured by mortgage (k) The contrary intention must be unequivocally expressed (l) A direction to pay debts out of the estate is ineffectual Contrary intention is to be signified by express words or by language employed clearly

- (a) *Ancaster v Meyer* 1 Bo C C 454, *Goodwin v Lee*, 1 K & J 377, *Yonge v Furze* 20 Beav 380
- (b) *Ancaster v Meyer* 1 Bro C C 454
- (c) *Re Baron Kensington* (1902) 1 Ch 203
- (d) Administration of Estates Act, 1925, 15 Geo V c 23 S 35
- (e) *Mellish v. Wallins*, 2 J & H 194

- (f) *Re Newmarch* 9 Ch D 12, *Nelson v Page* 7 Eq 25, *Re Rossiter* 13 Ch D 355 W 1099 12 Ed
- (g) *Elliott v Dearsley*, 16 Ch D 322
- (h) *Goodwin v Lee* 1 K & J 377
- (i) *Re Valpy*, (1906) 1 Ch 531 W 1104
- (j) *Re Belmstein* (1925) 1 Ch 12
- (k) *Re Fleck*, 37 Ch D 677
- (l) *Goodwin v Lee*, 1 K & J 377

indicating that the testator meant the heir or devisee take the land free from the encumbrance and to throw the charge upon the real estate (a) A direction to the devisee to repay a loan with interest amounts to the creation of a charge on the devised property (b) A testator gave a house subject to an equitable mortgage to his widow and directed all just debts be paid as soon as may be held this was not evidence of contrary intention and the widow took the estate subject to the mortgage (c)

4 Rateable Distribution of Debts In *re Smith* (d) a testator after directing the payment of his debts *etc.*, devised a freehold estate to his wife absolutely and requested the executors to sell and convert into money what ever freehold or other property he possessed The whole of the testator's real estate was subject to one mortgage held the mortgage debt must be borne rateably by all the properties comprised in the mortgage Where two estates subject to a mortgage are devised to two devisees the two estates bear the mortgage debts rateably (e) Where there is an indivisible gift of lands subject to distinct mortgages or charges *ie* a gift of an aggregate mass the aggregate lands are liable for the aggregate charges in exoneration of the testator's personal estate (f) Where a testator's personal estate is insufficient for the payment of debts a specific legacy charged by the testator with the payment of a sum of money must bear the burden of the encumbrance any other specific legatee is not bound to pay any part of the burden the reason being that the testator is presumed to have intended that each specific legatee should take his property Therefore one specific legatee cannot call upon another to contribute (g)

5 Explanation It has been added to make it clear that though a periodical payment of land revenue or in the nature of rent is a first charge upon the property devised yet it is not such an encumbrance as is contemplated by the section so the devisee is not liable to pay it but it is to be paid in the manner laid down in S 169 (h)

168 (S 155). Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Completion of testator's title to things bequeathed to be at cost of his estate

Illustrations

(i) A having contracted in general terms for the purchase of a piece of land at a certain price bequeaths to B, and dies before he has paid the purchase money The purchase money must be made good out of A's assets

- (a) *Woolstencroft v Woolstencroft* 2 D G F & J 347 *Romson v Harrison* 31 Bear 207 but see *Newman v Wilson* 31 Bear 33
(b) *Girish v Anundomoyi* 141 A 137 15 C 66
(c) *Pembroke v Friend* 1 J & H 132.
(d) 33 Ch D 195 *Sackville v Smyth* 17 Eq 153 *held*.

- (e) *Gibbins v Eyden* 7 Eq 371, *Re Newmarch* 9 Ch D 12 see *Sackville v Smyth*, 17 Eq 153
(f) *Re Barron Kensington* (1932) 1 Ch 203
(g) *Re Butler* (1894) 3 Ch 250
(h) See *Barry v Harding* 1 Jo & L 475 490

(ii) A, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

The section. The section applies to the wills of Hindus, etc. The preceding section deals with charges created on a specific bequest by the testator himself or by a person through whom he claims. This section deals with liabilities arising out of the fact that the testator's title to the bequest is not completed at the time of his death. The legatee is entitled to be exonerated only to the extent necessary to perfect the testator's title. He cannot claim to have the liabilities removed in every case at the cost of the testator's estate. In order that the section may apply it has to be ascertained whether the testator's title to the thing bequeathed is complete or not (a). Therefore, where it has been agreed that the purchase money or a part of it will be left unpaid at the time of the completion of sale, it will not be payable by the executor, provided the title has passed to the testator. Illust. (ii) makes that quite clear. That illustration has reference to the class of cases where the title passes though the purchase money or a part of it remains unpaid (b).

The rule. The principle underlying the section is that the obligation of completing the testator's interest in the subject-matter of the bequest falls on the testator's general estate (c).

The rule applies to the case of a rescission of a contract for purchase by the testator of property which has been specifically devised. Therefore, if on account of delay of the executor in completing the purchase, the contract be rescinded, the devisee is entitled to have the money laid out in other lands which are to be settled in the same manner as the land contracted for was settled by the testator. On an insufficiency of assets the devisee will be entitled to the assets so far as they go. Where the legatee has paid out of his own pocket, he can claim the amount from the executor (d) but not where the contract has been put an end to by consent of parties (e). The rule also applies to cases of gifts of shares where the testator has not paid the calls necessary to complete his title, the debt due in respect of those shares is due not from the legatee but from the testator and, therefore, must be discharged out of the testator's assets (f). As regards calls after acquisition of title, see S 170.

(a) As to completion of title see T P Act S 54.

(b) *Nital v Champaklata* 29 C L J 250. *Gostho v Rohini*, 13 C W N 692 (case under T P A).

(c) *Eccles v Mills* 1898 A C 360, 373. *Armstrong v Burnet*, 20 Bear 424. *Re Hughes* (1913) 2 Ch 491.

(d) *Broome v Monck*, 10 Ves 597, see *Lysaght v Edwards* 2 Ch D 499 521 W 1108 12 Ed.

(e) *Re Cockcroft* 24 Ch D 94.

(f) *Moffett v Baies* 3 Sm & G. 465, see *Day v Day* 1 Dr & Sm 261 W 1100 19 12 Ed.

169. (S. 156). Where there is a bequest of any interest in immoveable property in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, up to the day of his death.

Illustration

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate will make good 25 rupees in respect of the rent.

The section. The section applies to the wills of Hindus, etc. This section seeks to apportion liabilities incident to thing bequeathed which are of a recurring nature between the testator's estate and the legatee. It does not interfere with the right of the superior landlord to proceed against the legatee or the testator's estate for the recovery of arrears of rent. Where a testator held a property as the assignee of a building lease and bequeathed it to a person for life and the lease contained several covenants on the part of the lessee including covenants to keep the premises in repair and insured against fire, it was held that the tenant for life took the property with the burden and was liable to pay the head rent and taxes out of his own money during his occupancy but was not liable for repairs necessary at the commencement of his interest or in respect of breaches of covenant which had arisen before the testator's death. He was not bound to keep the property insured (a)

The rule. It has been thus stated, "the specific legatee must bear the ordinary outgoings incident to the property, such as fines and ground rent accrued since the death and the ordinary outgoings and the continuing obligations under the lease" (b). Liabilities accrued due prior to the testator's death are 'debts of the testator's estate, and should therefore be paid by the executors and paid for out of corpus' (c)

170 (S. 157.) In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of the stock, such call or payment shall, as between the testator's estate and the legatee, be borne by the estate; but, if any call or other payment becomes due in respect of such stock after the testator's

(a) *Re Betty*, (1899) 1 Ch 821.
 (b) *T. 183 Fitzmilliams v. Kelly*, 10 Hare 266; *Re Redding* (1897) 1 Ch. 876, *Re Taber*, 51 L J Ch 721.
 (c) J. 1177, 7 Ed *Re Betty*, (1899) 1

Ch 821; *Re Owen*, (1912) 1 Ch 519 (case of leasehold subject at a loss, the rent accrued due prior to testator's death was payable out of the testator's estate)

(ii) A having contracted for the purchase of a piece of land for a certain sum of money one half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to B and dies before he has paid or secured any part of the purchase money. One half of the purchase money must be paid out of A's assets.

The section The section applies to the wills of Hindus etc. The preceding section deals with charges created on a specific bequest by the testator himself or by a person through whom he claims. This section deals with liabilities arising out of the fact that the testator's title to the bequest is not completed at the time of his death. The legatee is entitled to be exonerated only to the extent necessary to perfect the testator's title. He cannot claim to have the liabilities removed in every case at the cost of the testator's estate. In order that the section may apply it has to be ascertained whether the testator's title to the thing bequeathed is complete or not (a). Therefore where it has been agreed that the purchase money or a part of it will be left unpaid at the time of the completion of sale it will not be payable by the executor provided the title has passed to the testator. Illust (ii) makes that quite clear. That illustration has reference to the class of cases where the title passes though the purchase money or a part of it remains unpaid (b).

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The rule applies to the case of a rescission of a contract for purchase by the testator of property which has been specifically devised. Therefore if on account of delay of the executor in completing the purchase the contract be rescinded the devisee is entitled to have the money laid out in other lands which are to be settled in the same manner as the land contracted for was settled by the testator. On an insufficiency of assets the devisee will be entitled to the assets so far as they go. Where the legatee has paid out of his own pocket he can claim the amount from the executor (d) but not where the contract has been put an end to by consent of parties (e). The rule also applies to cases of gifts of shares where the testator has not paid the calls necessary to complete his title; the debt due in respect of those shares is due not from the legatee but from the testator and therefore must be discharged out of the testator's assets (f). As regards calls after acquisition of title see S 170.

(a) As to completion of title see T P Act S 54.

(b) *Nital v Champaklala* 29 C L J 250. *Gosho v Rohini* 13 C W N 692 (case under T P A).

(c) *Eccles v Mills* 1898 A C 360. *373, Armstrong v Burnet* 20 Bear 424. *Re Hughes* (1913) 2 Ch 491.

(d) *Broome v Monck* 10 Ves 597. *see Lysaght v Edwards* 2 Ch D 499. 521 W 1108 12 Ed.

(e) *Re Cockcroft* 24 Cl D 94.

(f) *Moffett v Bates* 3 Sm & G 468. *see Day v Day* 1 Dr & Sm 261 W 1100 14 12 Ed.

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(a) *Re Biv* (1897) 1 Ch. 821.

(b) *T 183, Farnham v. Kel.* 10 Har. 266. *Re Redd* (1897) 1 Ch. 876. *Re Toller* 51 L. J. Ch. 721.

(c) *J 1177, 7 Ed. Re Biv* (1897) 1

Ch. 821. *Re Owen* (1912) 1 Ch. 519 (case of lease of subject at a low the rent accrued due prior to testator's death was payable out of the testator's estate).

death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest

Illustrations.

(i) A bequeaths to B his shares in a certain railway. At A's death there was due from him the sum of 100 rupees in respect of each share, being the amount of a call which had been duly made, and the sum of five rupees in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

(ii) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 100 rupees in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.

(iii) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death a call is made in respect of the shares. B must pay the call.

(iv) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the affairs of the company are wound up and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(v) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of fifty rupees per share payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

The section. The section applies to the wills of Hindus *etc.* The section limits the liability of the testator's estate to calls actually made before his death. Calls made subsequent to that date will be borne by the legatee. The principle is thus the same as that laid down in S 169. The whole extent of unpaid calls is not treated as a liability of the testator's estate so as to be payable out of it. The apportionment however is made only as between the executor and the legatee. It does not affect the rights of the Company concerned to proceed against the executor. In fact the Company cannot proceed against the legatee until certain steps have been taken in order to complete the gift. The section in no way affects the rule laid down in S 168. Where the interest of the testator in the subject matter which he professes to bequeath is complete or where it is so treated and considered by him, the future calls fall on the legatees and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath then the general personal estate is liable. (a) The rule does not apply to the case of a legacy of shares to a person for life with a gift over, on the ground that the manifest intention of the testator was that there should be no separate dealing with those shares till after the death of the tenant for life, and therefore all calls made during the lifetime of the tenant for life must be paid out of the testator's general estate. (b)

(a) *Day v Day* 1 Dr & Sm 261
On this Mr Theobald remarks, ought they not to have been charged upon

the shares? and refers to *Macdonald v Irvine* 8 Ch D 101. 8 Ed p 184

Calls due. Calls are not considered to be really made until call letters are sent to the shareholders. A call is not due by the mere issue of notices authorising calls (a).

If he accept. A legatee is liable under this section if he accept the bequest. Where he renounces a legacy the testator's estate is liable (b). A legatee, if he accept, is entitled to the dividends, if any, from the testator's death (c).

CHAPTER XVIII.

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

171. (S. 158.) If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Illustrations.

(i) A bequeaths to B a pair of carriage-horses or a diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(ii) A bequeaths to B "my pair of carriage-horses". A had no carriage-horses at the time of his death. The legacy fails.

The section. The section applies to the wills of Hindus, *etc.* A general legacy is distinguished from a specific legacy by the fact that it is not a gift of a specified part of the testator's property, and from a demonstrative legacy by the fact that payment is not directed to be made out of any specified part of property.

This section lays down that the executors are bound to purchase for the legatee what may answer to the description of the legacy if the estate of the testator's assets will allow it. The mere fact that the particular thing bequeathed happens to exist at the time of the testator's death does not make the legacy specific. As has been said before that depends on the intention of the testator and the language of the will (d). It has also been stated before that in case of a legacy of shares if owing to alteration in the constitution of a company it is impossible to determine the value of the shares, the legacy will fail (e).

- (a) *Addams v Fenck*, 26 Beav 384;
Blount v. Hopkins, 7 Sim 43. J 1933
 (b) *Moffett v. Bates*, 3 Sm & G. 463
 (c) *Wright v. Warren*, 4 D G. & Sm
 367.
 (d) *Wilson v. Brownsmith*, 9 Ves

- 180; *Re Willcock*, (1921) 2 Ch
 327; but see *Page v Young* 19
 Eq 501 (specific). J. 1039 7 Ed
 (e) *Macdonald v Irvine*, 8 Ch D 101;
Re Gray, 36 Ch. D 205. T. 159
 8 Ed.

In list (u) the legacy is specific and as the thing does not exist at the time of the testator's death the legacy is adeemed

It may be noted that legacies are payable primarily out of the residue and if that be exhausted out of the general estate of the testator (a)

CHAPTER XIX.

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

172. (S. 159) Where the interest or produce of a fund is bequeathed to any person, and the Bequest of interest or produce of fund will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interest, shall belong to the legatee.

Illustrations.

(i) A bequeaths to B the interest of his 5 per cent promissory notes of the Government of India. There is no other clause in the will affecting those securities. B is entitled to A's 5 per cent promissory notes of the Government of India.

(ii) A bequeaths the interest of his 5½ per cent promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life, and C is entitled to the notes upon B's death.

(iii) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

1. *The section.* The section applies to the wills of Hindus, etc. 'The section though it speaks only of the interest or produce of a fund, applies also to immovable property (b) and is based on the well known rule that a gift of a produce of fund is a gift of that produce in perpetuity and is consequently a gift of the fund itself, unless there be something on the face of the will to show that such was not the intention of the testator.' The Court has therefore to examine the clauses of the will in order to see whether they give any indication of such contrary intention (c)

2. *The rule.* This section lays down the well known rule of law that an unlimited or unqualified gift of the income is a gift of the corpus as well

(a) *Re Oley* 20 Ch D 676
) *Hemangini v Nobin*, 8 C 783

(c) *Mandakini v Arunbala* 3 C L J 515

If the produce of stock be given without limitation, it carries the principal. If the rents and profits of an estate be given without limitation, it passes an absolute estate. An unlimited gift of annual produce is a gift of the thing itself (a). A gift of the income of land unrestricted is simply a gift of the fee simple (absolute interest) of the land. Income means rent and profits (b).

Intention to be the guide. The section also declares that a gift of the income will amount to a gift of the corpus only in the absence of an intention that the enjoyment of the bequest is to be for a limited duration only, e.g., for life or till remarriage. In case of a bequest for such a limited period the legatee is not entitled to the corpus, the application of the section, therefore, depends on the construction of the will. Thus, where a testator left the residue of his estate upon trust to pay the dividends of £1500 stock to A for life and at her death directed the same to be equally divided among his wife and niece and the survivor of them the Court observed, 'an unqualified gift of the income of a fund vests an absolute, and not merely a life interest, in the fund but it is always a question of construction of a will to discover whether the testator's intention was to give more than a life interest.' The rule, however, 'is not a very strong rule. In all such cases the Court is obliged to find out the meaning of the testator from the words which he has used.' It was held that the survivor was entitled to a life interest only in the annuity (c). Where a testator gave 'the annual interest only of all the residue of my property' in equal shares among the children of A and in case of death of any child his share was to devolve on the survivors successively until the whole amount of the residue came into the hands of the grandchildren and great-grandchildren of A, the court, on construction of the will, held the testator's meaning (as controlled by the use of the word 'only') to be to give the income only to the children and a gift by implication to the children of those children, which latter carried to them absolute interests (d). In *Shoolroy v Monoharry* (e) it was held that the gift of the income could not be construed as a gift of the corpus in conformity with the general intention to be gathered from the whole will, because the testator plainly intended that there should be no gift of the corpus, which was to remain in tact and inalienable and not liable to partition and therefore this section had no application. In *Karsandas v Ladkaiahu* (f) the legatee was held entitled to a life interest in the subject matter of the bequest. A gift of half of the net rental income from some property has been held to be a gift of the specific property itself (g).

The rule laid down in the section thus only applies where the will affords no indication of an intention that the enjoyment of the bequest shall be of a limited

- (a) *Stretch v Watkins* 1 Madd 253, 256, *Ramlings v Jennings*, 13 Ves 39
 (b) *Mannox v Greener* 14 Eq 456 462
 (c) *Blann v Bell*, 5 D G & Sm 658, see *Jennings v Batly*, 17 Beav 118, *Page v Young*, 19 Eq 501 *Page v Leapingwell*, 18 Ves 463

- (d) *Weatherell v. Weatherell*, 4 Giff 51, see *Anand Rao v Adm Genl* 20 B 450, 464
 (e) 7 C 269 279, on app 12 I A 101 109 11 C. 684 692
 (f) 12 B 185, 198 see *Re Sanderson's Trusts* 3 K & J 497
 (g) *Fernandez v Coelho* 84 I C 1029

duration (a) The section does not however require that the contrary intention of the testator should be indicated by express words. It is sufficient if the contrary intention appear sufficiently from the language of the will read as a whole (b)

3 **Extent of operation of the rule** The rule will apply though the testator directs the interest or produce to pass through the hands of a manager or trustee (c). The rule applies to powers of appointment, so that a power authorising the disposal of income carries the power to dispose of the capital (d). It has been applied to a gift subject to a condition. Thus where there was a gift of £3 monthly so long as a woman remained unmarried or until a sum of £200 becomes exhausted on her dying unmarried her executrix was held entitled to the unspent balance of £200 (e). The principle has been applied to cases other than those of legacies (f). Where the gift is not of the interest or produce of a fund but of an annual sum even though it be of the exact amount of income or produce this rule has no application (g), nor to gifts of profits of partnership unless it be a gift of a share of the nett profits in a limited company when it will be a gift of the corpus of the shares (h).

4 **Cases** A gift of £200 per year being part of the monies I now have in Bank security entirely for her use and disposal was held to be a gift of the absolute interest in so much stock as would produce £200 a year (i). An indefinite gift of the dividends through trustees gives absolute property in stock (j). A gift in equal shares of the benefit interest and profit of a certain fund was held to be a gift of the corpus (k). A bequest of the interest of personal estate in remainder passes the absolute interest to the remainderman subject to the life interest of the prior legatee (l). In *Hemangini v Nobin* (m) the Court observed. We think in giving to these heirs a specific share of the rents and profits he must be held according to the principle laid down in *Mannox v Greener* (n) to have given to each of those persons a share in the estate corresponding with the share of the profits which is specifically inserted in the will. Where a testatrix left lands to her sons for the support of the daily worship of an idol and directed that in the event of there being a surplus it should be applied to the support of the family held the bequest of the surplus amounted to a gift of a share in the property (o).

- (a) *Damodardas v Dayabhal* 21 B 1 15 on app 25 1 A 126 22 B 833, *Sita Rau v Villa* 21 M 425 (absence of power of alienation implied a limited interest), *Vallubhdas v Thacker* 14 B 360 *Adm Genl v McOne* 15 M 448 *Adamson v Amlilage* 19 Ves 416
- (b) *Niladrinath v Sarojnath* 62 1 C 681, *Page v Young* 19 Eq 501
- (c) *Goswami v Madhudas* 17 B 690 616 *Ahli v Reball* 14 C L J 618 *Adamson v Amlilage* 19 Ves 416
- (d) *Re L Herminier* (1894) 1 Ch 675
- (e) *Re Howard* (1901) 1 Ch 412 following *Rishon v Cobb* 5 My & Cr 145 but see (1910) 1 Cl 695
- (f) *Re Andrews Trust* (1905) 2 Ch 48
- (g) *Going v Harlan* 11 4 C. L 144 but see *Hemangini v Nobin* 8 C. 788

- (h) *Re Lawes Willswonge* (1915) 1 Cl 408 *Humphrey v Humphrey* 1 S m N S 536
- (i) *Rawlings v Jennings* 13 Ves 39
- (j) *Page v Leapingwell* 18 Ves 463 *De Souza v Vaz* 12 B 137 147 *Southous v Bate* 16 Beav 132
- (k) *Ado Genl v Money* 15 M 448 467
- (l) *Clough v Wynne* 2 Madd 188
- (m) 8 C 788 801 affd in 12 1 A 103 11 C 694
- (n) 14 Eq 456 see illust (i)
- (o) *Ashutosh v Doorga* 6 1 A 142 5 C 438 in *Jageswar v Ram Chund* 23 1 A 37 23 C 670 a gift of a fourth share of the testator's estate to his daughter and her son for your maintenance with power of alienation was held to constitute an absolute gift to them

CHAPTER XX

OF BEQUESTS OF ANNUITIES

173 (S. 160). Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it

Annuity created by will payable for life only unless contrary intention appears by will

Illustrations

(i) A bequeaths to B 500 rupees a year B is entitled during his life to receive the annual sum of 500 rupees

(ii) A bequeaths to B the sum of 500 rupees monthly B is entitled during his life to receive the sum of 500 rupees every month

(iii) A bequeaths an annuity of 500 rupees to B for life and on B's death to C B is entitled to an annuity of 500 rupees during his life C if he survives B is entitled to an annuity of 500 rupees from B's death until his own death

1 The section The section applies to the wills of Hindus etc An annuity has been defined as a periodical payment of money either bequeathed as a gift or secured by the personal covenant or bond of the payer (a)

2 Annuities and legacies Annuities are legacies unless the context of the will shows that such was not the intention of the testator (b)

3 Kinds of annuities Annuities may be of three kinds namely (i) for a term e.g. by way of remuneration to an executor or trustee for his trouble Such an annuity ceases with the active trusts or the cessation of duties (c) An annuity may again be granted to a person for a fixed period for maintenance Such an annuity lasts for the whole of the period and is not terminated by the attainment of majority by or even by the death of the annuitant (d) e.g. to a parent during the minority of a child of his which will go to the representatives of the parent on his death during minority of the child (e) and on the child's death the parent will continue to get it till the child would have attained majority if alive provided the annuity was for the parent's benefit (f) but not if the gift was for the benefit of the child (g) or (ii) for life or (iii) perpetual. These last two kinds of annuities are dealt with in this section and in the next

- (a) Wharton Law Lex con
 (b) *Scholefield v Redfern* 2 Dr & Sm 173 *Gaskin v Rogers* 2 Eq 284
 See S 174 n see J 1099 1101 7 Ed
 (c) *Scholefield v Redfern* 2 Dr & Sm 173 *Baker v Martin* 8 Sm 25 *Hull v Christian* 17 Eq 546 J 1105

- (d) *Leves v Leves* 16 Sm 265, *Allwood v Alford* 2 Eq 479
Re Ord 12 Ch D 22
 (e) *Laxton v Gedle* 19 Beav 321
 (f) *Coles v Needham* 2 Vern 65
 (g) *Lemay v Holbrenden* 3 P W 176
 see *Castle v Eale* 7 Beav 296 T 469 8 Ed

4 For life only It is a well settled rule of law that a gift of an annuity without more is a gift for life only (a) and does not amount to a gift of the corpus, and so does not entitle the annuitant to the value of the annuity (b) In other cases, the will has to be construed in order to determine whether the annuity is for life or perpetual (c)

5 Contrary intention A simple bequest of an annuity implies no more than a gift for life unless there is something in the will to enlarge the gift The presumption, therefore, is in favour of an annuity for life in the absence of any indication by the testator to the contrary (d) The section does not require the contrary intention to be indicated by express words it is sufficient if the contrary intention appears sufficiently from the language of the will (e) Where such contrary intention appears the principle enunciated in this section cannot apply (f)

6. Notwithstanding that, etc. If the bequest consist simply of an annuity then, even if it be directed to be paid out of property generally or out of the interest of a fund bequeathed, it will nevertheless be a gift for life (g) Something more is necessary to enlarge the gift beyond such directions (h), (see next section)

Accordingly it has been held that an annuity will be for life only even (i) if it be charged upon property, or (ii) if it exhaust the whole of the rents and profits of property (i), or (iii) if it be charged upon a fund or if it be given out of the income of a fund, or if a fund be given upon trust to pay the annuity (j), or (iv) if a certain sum be invested to produce a certain income (l) or annuity (l), or (v) if it be in such forms as to A or his descendants (m), or to A for his life and then to his children, or to A, B and C and the survivors of them (n) An annuity to several persons is an annuity for the life of the survivor (o), if without survivorship then a separate annuity to each, which ceases on the death of each annuitant (p), or if it be in these terms e.g., an annuity of £100 'to be secured A (q) or for maintenance and education (r)

- (a) *Blewitt v Roberts* 10 L J Ch 342, *Nichols v Hawkes* 10 Hare 342, *Re Taber*, 51 L J Ch 721, *Gopal v Ramnath*, 5 Bom L R 729, *Agnew v Matthews*, 1 Mad H C R 17
- (b) *Wright v Callender*, 2 D M & G 652, *Miner v Baldwin* 1 Sm & G 522
- (c) *Niladrinath v Sarojnath* 62 I C 681
- (d) *Poffter v Baker* 13 Beav 273, *Hill v Ralley* 2 J & H 634 W 770
- (e) *Niladrinath v Sarojnath* 62 I C 681
- (f) *Rajlaksh v Sarola* 56 I C 803
- (g) See *Gopal v Ramnath* 5 Bom L R 729
- (h) *Panchu v Kalidas*, 24 C W N 597, 595, see *Gopal v Ramnath* 5 Bom L R 729
- (i) *Sullivan v Galbraith* 11 R 4 Eq 582, *Blight v Hartnoll* 19 Ch D 294
- (ii) *Wilson v Maddison* 2 Y. & C

- C C 372, *Re Morgan* (1893) 3 Ch 222
- (k) *Re Groves Trusts* 1 Giff 74
- (l) *Re Taber* 51 L J Ch 721
- (m) *Re Morgan* (1893) 3 Ch 222
- (n) *Blewitt v Roberts* 10 Sim 491, *Sullivan v Galbraith* 11 R 4 Eq 582, *Blight v Hartnoll* 19 Ch D 294 J 1102 7 Ed
- (o) *Wilson v Maddison* 2 Y & C C 372
- (p) *Re Evans* 77 L J Ch 583
- (q) *Re Lord Strathenden and Campbell*, 1893 W N 90, *Lewes v Lewes* 16 Sim 266
- (r) *Re Booth* (1894) 2 Ch 282, *Williams v Popworth* 1900 A C 563, *Re Yales* (1901) 2 Ch 433 (where an annuity given to the widow for the maintenance and education of the testator's infant daughter did not cease on the widow's death during the infancy of the daughter but see *Gardner v Barber* 18 Jur 509) J 1103

or *pur autre vie*, when it is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie* (a) But an annuity granted to a person, his sons, grandsons and so on is a perpetual annuity (b).

7. Distinction between Ss. 173, 174 and 172. The distinction between the two kinds of annuities, for life and perpetual, and the produce of a fund as mentioned in the last section has been thus set forth —“As a general rule there can be no doubt that the gift of an annuity to A is a gift of the annuity during the life of A and nothing more. It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity (c). It is equally without doubt that there are cases in which the Court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the Court holds that the unlimited gift of the income is a gift of the corpus from which the income arises (d)

“Where there is in terms a gift of the interest or dividends or produce of the estate and that gift is indefinite in point of time, such a bequest will generally carry the corpus absolutely, but when, on the other hand, the gift is in its terms simply a gift of so much a year, its effect is to give an annuity for life” (e) “The gift of the produce of a fund, whether particular or residuary, without limit as to time, is a gift of the fund itself, (but) where a testator speaks of an annuity which he gives to a person for life, as if it were in existence after the death of such person, irrespective of any words added for the purpose of continuing its existence for the benefit of any other person, there the annuity given indefinitely to such other person is a perpetual annuity” (f)

8 Illustration (iii). It illustrates the rule now well settled that if a gift be to A for life with remainder to B, the gift to B is not of a perpetual annuity, simply because the limitation is expressed in the one case but not in the other (g).

9. Jurisdiction. A suit to recover arrears of annuity payable out of the interest of G P. notes has been held to be cognisable by the Small Causes Court (h)

(a) *Re Ord*, 9 Ch D 667, 12 Ch D 22 fold in *Re Cannon* (1915) W N 344

(b) *Sobha Kanta v Kariman*, 60 I C 750

(c) See *Hedges v Harpur*, 3 D G. & J 129, *Mansergh v Campbell*, 3 D G & J 232

(d) *Blight v Hartnoll* 19 Ch D 294, cited in *Panchu v Kalidas*, 24 C. W. N 592,

(e) *Agnew v Mathews* 1 Mad H C R 17

(f) *Yates v Maddon*, 3 Mac & G 532, explaining *Stokes v Heron*, 12 Cl & F. 161; see *Panchu v Kalidas*, 24 C W N 592

(g) *Blight v Hartnoll* 19 Ch D. 294, following *Lett v Randall*, 2 D F. & J 389

(h) *Dossital v Coorambat*, 32 B 575, 10 Bom L. R. 758

is difficult to see how any distinction can fairly be drawn between a gift of a definite sum to purchase an annuity and a gift of so much money as is requisite to purchase a definite annuity. *Id certem est quod certum reddi potest*''

4. Cases. Where property was given with a direction to produce two annuities which were to last longer than the lives of those who were to enjoy them, *held*, the annuities were perpetual and the gifts were of so much property as should produce the income and the codicils not being clear, did not alter the nature of the annuities (a) In *Hill v Rattey* (b), there was a bequest of £500 a year to B preceded by a bequest of all the testator's property to A from which the Court inferred that the excepted bequest must be of the same nature as the other, although there were no actual words indicating segregation and appropriation of property, and B was held entitled to so much property as would produce £500 a year. Where there was a bequest of an annuity to A and B and to the survivor for life and if A should have any children then to be equally divided between them, *held*, that the children of A took absolute interests (c) In *Hicks v Ross* (d) an annuity to the wife was held to be for life but that to the children to entitle them to the corpus

5 Option The annuitant may elect either to take the sum (e) or to have it laid out in an annuity (f) In the latter case a Government annuity should be purchased or the capital value should be calculated by reference to the Government tables and not the price by which an annuity could be purchased from an insurance company (g)

175 (S. 162) Where an annuity is bequeathed, but Abatement of the assets of the testator are not sufficient annuity. to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

1. The section The section applies to the wills of Hindus, *etc* Prima facie all legacies stand on an equal footing (h) and legacies include annuities (i) as well as gifts made in the shape of a bequest of a sum payable at once (j) It follows that in case of a deficiency all annuities and legacies will abate rateably (k) The rule is subject to exception *e.g.* In some cases either annuities or legacies are to be paid in priority to other bequests, "but it is settled that the onus lies on the party seeking priority, to make out that such priority was intended by the testator, and that the proof of this must be clear and conclusive" The reason is that the testator, in the absence of

(a) *Stokes v Heron* 12 Cl & F 161, 192, 194. *fold in Evans v Walker*, 3 Ch D 211

(b) 2 J & H 634

(c) *Robinson v Hunt* 4 Beav 450

(d) 14 Eq 41

(e) *Stokes v Check*, 28 Beav 620, *Hicks v Ross* (1891) 3 Ch 499, *Re Robbins* (1907) 2 Ch 8, *Re Bruning* (1909) 1 Ch 276

(f) *Kerr v Middlesex Hospital* 2 D M & G 576; *Ford v Batley* 17

Beav 303, *Stokes v Check* 28 Beav 620, *Re Robbins* (1907) 2 Ch 8 W 771 sq 12 Ed

(g) *Re Castle* 1916 W N 19, See S 343, but see *Re Smilh* 130 L T 185

(h) *Thwaites v Foreman* 1 Coll 409, 414

(i) See last S note

(j) *Heath v Weston* 3 D M & G 601

(k) *Hume v Edwards* 3 Atk 693; *Re Richardson* (1915) 1 Ch 353

clear and conclusive proof to the contrary, must be deemed to have considered that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency by giving a priority, in case of deficiency, to some of the objects of his bounty (a) Where both annuities and legacies are charged upon real estate, though the annuitants have a right of distress and entry, they and the legatees will take rateably (b) The rule applies to the case of a reversion so that in the case of a clear gift of a life interest and of a reversion, if the estate proves insufficient each party, the tenant for life and reversioner, must bear the loss in proportion to his interest (c)

2 Valuation of annuities The rule adopted by the Court for the purpose of ascertaining the proper proportionate abatement of legacies and annuities respectively is to put all on the same level and to convert the annuities into pecuniary legacies To effect this each annuity is valued at the date when it would have been payable had it taken the form of a pecuniary legacy and the value so ascertained is treated as a pecuniary legacy liable to abate rateably with the other legacies (d)

More elaborate rules are laid down in *Todd v Bielby* (e) They are as follows (i) if all the annuitants be alive, the values of the annuities are ascertained and the fund is divided in proportion of such values (f), (ii) if all the annuitants be dead, the fund is divided in the proportion of the arrears of annuities, (iii) if some of the annuitants be alive and some dead the values of the annuities which have expired must be fixed at what the annuitants would have actually received had the fund not been deficient the values of those which are still subsisting must be ascertained by adding the amount of arrears actually accrued to the present value of the annuity and the fund must be apportioned accordingly

3 Abatement of annuities inter se Annuities abate between themselves (g), and in *re Wilkins* (h) the balance of the fund was directed to be apportioned between two annuitants after deducting from the fund the legacy duty payable in respect of one annuity which was given free of legacy duty. In *Re Metcalfe* (i) annuitants were not asked to bring into hotchpot sums received out of income or paid out of capital

4 Deficiency of annuity whether can be paid out of corpus One question has frequently come up for determination in the English Courts, viz., whether, on a deficiency of fund, the annuitant can claim the deficiency to be made good out of the corpus If the bequest be expressly of an annuity as contemplated by section S 173, or if it be directed to be paid exclusively out of the

(a) *Miller v Huddleston* 3 Mac & G 513, 523

(b) *Roper v Roper* 3 Ch D 714

(c) *Croly v Held* 3 D M & G 993

(d) *Arnold v Arnold*, 2 My & K. 365

(e) 27 Beav 353. J 2022 sq. *Heath v Nugent*, 29 Beav 226. see also *Re Rushon* 3 C. 736.

(f) *Wroughton v Colquhoun*, 1 D G & S 357

(g) *Innes v Mitchell* 2 Phil. C. C.

346. W 690 12 Ed

(h) 27 Ch D 703 When an estate is insufficient to pay in full annuities given by the will the fund must be apportioned between the annuitants in the proportion in which the sums composed of the arrears of the annuity in each case plus the present value of the future payments bear to each other *Ibid* Head note

(i) (1903) 2 Ch 424. *Potts v Smith*, 8 Eq 663 considered

income then the annuitant has no claim on the corpus and on a deficiency the annuitant must bear the loss (a) Where however the bequest is not of an annuity simply, but of the income of a sum of money directed to be set apart then in case of deficiency it may be made good out of the general estate of the testator (b) Where trusts are created subject to the payment of an annuity (c), or where the fund is directed to fall into the residue after the payment of the annuity (d) it is a charge on the corpus Where land is charged with the payment of an annuity (e) or the annuity is directed to issue out of rents and profits (f), the annuity may be directed by the Court to be paid by sale of land (g) See next section

176 (S. 163). Where there is a gift of an annuity and

Where gift of a residuary gift, the whole of the annuity is to be satisfied before any part of the residuary gift, whole residue is paid to the residuary legatee, and, annuity to be first satisfied if necessary, the capital of the testator's estate shall be applied for that purpose

The section The section applies to the wills of Hindus *etc* The general rule is that the residuary legatee takes what remains after payment of the legacies (h) Therefore if there be a gift of an annuity and a residuary gift the annuity takes precedence and the whole loss falls on the residuary legatee (i) because the annuity stands on the same footing as a legacy (j) As has been observed A pecuniary legatee or an annuitant must be paid in preference to the residuary legatee who can take nothing till all the legatees and the annuitants have been paid in full The residuary legatee is entitled to nothing till the annuitants have been paid in full (k) Consequently before the residue can be ascertained it must be determined how much of the estate was properly applicable for the purpose of providing the annuities (l) The rule has been held to be subject to a contrary intention of the testator (m)

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| <p>(a) <i>Baker v Baker</i> 6 H L C 616
 <i>Forbes v Richardson</i> 11 Hare 354
 <i>Miller v Huddleston</i> 3 Mac & G 513
 <i>Booth v Coulton</i> 5 Ch 684,
 <i>Wormold v Muzeen</i> 50 L J Ch 776, (annuity charge on income only)
 <i>Re Boden</i> (1907) 1 Ch 132
 J 1112 sq</p> <p>(b) <i>Howarth v Rothwell</i> 30 Beav 516
 (see cases collected in fn at the end)
 <i>Blich v Sherratt</i> 2 Ch 644
 <i>Pearson v Hellwell</i> 18 Eq 411
 <i>Re Mason</i> 8 Ch D 411,
 <i>Carmichael v Gee</i> 5 A C 588
 <i>Re Tucker</i> (1693) 2 Cl 323 W 655</p> <p>(c) <i>Re Walkers</i> (1911) 1 Ch 1, <i>Re Young</i> (1912) 2 Cl 419</p> <p>(d) <i>Moj v Bennett</i> 1 Russ 370
 <i>Wright v Callender</i> 2 D M & G</p> | <p>652, <i>Re Cottrell</i> (1910) 1 Ch 402 W 884 5</p> <p>(e) <i>White v James</i> 26 Beav 191,
 <i>Scottish &c v Craig</i> 20 Ch 208
 <i>Horton v Hall</i> 17 Eq 437
 <i>Re Tucker</i> (1893) 2 Ch 323</p> <p>(f) <i>Hambro v Hambro</i> (1894) 2 Ch 564</p> <p>(g) T 571, 8 Ed</p> <p>(h) <i>Harley v Moon</i> 1 Dr & Sm 623
 <i>Elwes v Causton</i> 30 Beav 554
 <i>Re Lynne's Trusts</i> 8 Eq 482</p> <p>(i) <i>Croly v Held</i> 3 D M & G 993</p> <p>(j) See cases cited in last S</p> <p>(k) <i>Re Toolal's Estate</i> 2 Ch D 628
 <i>see Baker v Farmer</i> 3 Ch 537</p> <p>(l) <i>Anderson v Anderson</i> 33 Beav 223,
 <i>see May v Bennett</i> 1 Russ 370</p> <p>(m) <i>Farmer v Mills</i> 4 Russ 86
 <i>Hassonally v Popalal</i> 37 B 211</p> |
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The rule applies where the annuity fund is a part of the residue (a) or where the fund is to fall into the residue after the death of the annuitant (b). Where an annuity is charged upon the residue a sufficient part should be invested in Government annuity to produce the annuity and the balance distributed (c) In *Arnold v. Arnold* (d) there was a deficiency of the fund out of which the annuities were to be paid to A, B and C or the survivor of them and the fund was ultimately given to the residuary legatees Upon the death of one of the annuitants it was held that the surviving annuitants were entitled to have their annuities made up in full out of the released fund and the balance thereof fell into residue

Application of capital of testator's estate. See previous section note (4).

CHAPTER XXI.

OF LEGACIES TO CREDITORS AND PORTIONERS.

177. (S. 164). Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy, as well as to the amount of the debt.

Creditor prima facie entitled to legacy as well as debt.

1. The section. The section applies to the wills of Hindus, etc The rule laid down in this section is different from that in England

2. The English rule. The general rule is well established in England that where a testator gives to a creditor a legacy of equal or greater amount, that is a satisfaction of the debt (e) But no sooner was the rule established than learned Judges of great eminence expressed their disapproval of it (f) Thus if there was a difference in any circumstance between a legacy and the debt, e.g., the debt was payable in three months of the testator's death and no time was fixed for the payment of the legacy (g), or if the legacy was of a smaller amount (h), or of a different kind (i), there was no satisfaction of the debt, e.g., a legacy of a sum of money is no satisfaction of an annuity (j) nor a legacy of land of a

(a) *Wright v Callender*, 2 D M & G 652, *Carmichael v Gee*, 5 A C 5-8

(b) *Bright v Larcher*, 2 D G & J 149; *Haynes v Haynes* 3 D M & G 593, *Upton v Vanner*, 1 Dr & Sm 594; *Re Mason*, 8 Ch. D 411; *Carmichael v. Gee* 5 A C. 588; *Re Taylor*, 50 L. T. 717, T. 572 8 Ed

(c) *Horbin v. Masterman*, (1896) 1 Ch 351

(d) 2 My & K 365

(e) *Re Horlock* (1895) 1 Ch 516 (see cases reviewed)

(f) *Thynne v Glengall*, 2 H L C 131.

(g) *Thynne v Glengall*, 2 H L C. 131; *Charlton v West*, 30 Bear 124, *Re Rattenbury*, (1906) 1 Ch 667.

(h) *Re Hall*, (1918) 1 Ch 569 J 1135-9 7 Ed

(i) *Bellasis v Uthwall*, 1 Atk 426; see *Bengough v Walker*, 15 Ves 507

(j) *Watson v. Watson*, 33 Brav 574.

debt due on a bond. A contingent legacy is no satisfaction of a vested portion (a)

3. **The rule in India.** The English rule with its exceptions based on fine distinctions does not prevail in this country. The Law Commissioners in deliberately departing from the English law observed in their report to the Bill which became the Act of 1865 as follows (b) —“Here, as elsewhere, we have departed from the English law, where its provisions appeared to us to be objectionable in themselves, or especially inapplicable to India. Above all things, we have aimed at giving effect to the plain meaning of the words of the testator, without endeavouring to do, or say for him, that which he has not done, or said, for himself.”

‘We have accordingly discarded the rules by which the English Courts are compelled to presume, in the absence of any intimation to the contrary, that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, the legacy is meant by the testator to be a satisfaction of debt; that where a parent, who is under a legal obligation to provide a portion for his child, fails to do so, and afterwards bequeaths a legacy to the child, the legacy is meant to be a satisfaction or fulfilment of the obligation.’

“We have, in like manner, discarded the rule of English law, that where a father bequeaths a legacy to a child and afterwards advances a portion for that child, he thereby adeems the legacy. We have endeavoured so to frame the law in this respect as to prevent the occasion from ever arising, which in England requires a nice balancing of judgment, a large discretion, the prosecution of a difficult enquiry, and the admission of parol evidence of the intention of the testator.”

The result is that “so far as this country is concerned the doctrine of satisfaction is exploded. Section 164 (now 177) of the Indian Succession Act expressly abolishes it,” so that the creditor is entitled both to his legacy and to the debt, unless the testator intends otherwise (c)

Even in cases where this section does not apply it will be taken as laying down a generally correct principle of interpretation universally applicable unless overridden by some special provision of local law or usage. S. 92 of the Evidence Act would in that case defeat the plea of satisfaction (d)

4. **Satisfaction** “Satisfaction may be defined to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee” (e)

5. **It does not appear.** These words confine the scope of the Court's interpretation in the first instance to the language of the will and that alone. Where, therefore, there is no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred then the Courts are precluded from going outside the actual words used by the testator. Extrinsic evidence

(a) *Harbury v Harbury*, 2 Bro. C. C. 352, *Bellasis v Uthwall* 1 Atk. 426

(b) *Gazette of India*, July 1, 1864 p. 54 cited in M. 535-6

(c) *Hossonally v Popatlal*, 37 B. 211.

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(d) *Hossonally v Popatlal* 37 B. 211
(e) W. & T. L. C. 9 Ed. Vol. II
p. 326-7 cited in *Chichester v. Cockerly*, L. R. 2 H. L. 71 95

under S 75 is to be admitted only where there is an ambiguity in the language used by the testator. The inquiry under that section is not to be initiated where there is no ambiguity by imagining an ambiguity in the application of the language of the will to different sets of existing facts (a)

178. (S. 165.) Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy, as well as the portion.

Illustration

A, by articles entered into in contemplation of his marriage with B covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

1. The section. The section applies to the wills of Hindus, etc. The rule as to satisfaction of a portion is different in England. The Court has departed from the English law as will appear from the observations of the Law Commissioners cited under previous section. The rule is confined its operation to the case of a gift by a parent who is under obligation to provide a portion of for a child. It does not extend to the case of a stranger giving a legacy. He is understood as giving a bounty, not as paying a debt (b)

2. Portion. Where a parent gives a legacy to a child not stating the purpose for which he gives it, the Court understands him as giving a portion (c)

3. Parent. The term *prima facie* refers to the father. 'I do not say that in no case and under no circumstances can the duty (of making a provision for the child) fall on the mother of the child, but it appears to me that the burden of proving such to be the case lies on those who assert the fact to be so (d). The word includes a person standing in *loco parentis* towards the object of the gift, i.e., a person who has taken upon himself the parental obligation of making a provision for the legatee to fulfil the same natural or moral obligation as that of a parent (e)

4. Does not intimate. The presumption in England is very strong against double portions and the doctrines of satisfaction and ademption (see next section) rest on this presumption, but it is only a presumption. It is a presumption which is to be gathered from the circumstances of the case, and which may be

- (a) *Pestonji v Framji* 12 Bom L R 863
 (b) *Ex p Pye* 18 Ves 140
 (c) *Ex p Pye* 18 Ves 140
 (d) *Per Stirling J in Re Ashton* (1897) 2 Ch 574, reversed on another point

- (1898) 1 Ch 142
 (e) *Pomys v Mansfield*, 3 My & Cr 359, *Re Pollock* 28 Ch D 552, *Re Smythies* (1903) 1 Ch 259, *Fowkes v Pascoe*, 10 Ch 343

rebutted by other circumstances which countervail that presumption (a). It is just this presumption which the Law Commissioners observe that they have discarded in our country (b). Therefore here the rule is that a child will be entitled to both the legacy and the portion unless the latter is expressly declared to be in satisfaction of the former.

5 Election 'Where a person (in England) takes a bequest under a will which is held to be in satisfaction for a sum of money payable under a settlement, he must elect between the bequest and the gift. If he elects to take under the will, in as much as the provision by the will is a substitution for the provision by the settlement, the covenant is superseded and is not to be performed at all. If, on the other hand, he elects to take under the settlement, he must, to the extent of what he takes thereunder, give up what is bequeathed to him by the will, in order to compensate those who are disappointed by his election' (c).

179. (S. 166). No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee

No ademption by subsequent provision for legatee

Illustrations.

(i) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.

(ii) A bequeaths 40,000 rupees to B, his orphan niece whom he had brought up from her infancy. Afterwards, on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

1. The section. The section applies to the wills of Hindus etc. Here again the Legislature has departed from the English law (d).

2. Ademption. Ademption is of two kinds (1) Where a specific legacy "cannot take effect", by reason of the subject matter having been withdrawn from the operation of the will (S. 152) it is said to be adeemed, and (2) where a general legacy is given and it is held not to be payable because the intended bounty has already been satisfied by the testator, that is, there is an implied revocation of the gift of the legacy. The former has nothing to do with the intention of the testator (e). Ademption in the latter sense has been abolished in this country (f).

3. Ademption and satisfaction. The point in common is that in both cases the second gift is in substitution of the former benefit (g) (under English law). Ss 177 and 178 deal with satisfaction. This section deals with ademption. In satisfaction there is an already existing debt or obligation and then comes the legacy. In ademption, on the contrary, 'a legacy is in the first instance

(a) *Chichester v Coventry*, L R 2 H L 71, 93

(b) See S. 177 note

(c) 2 W & T L C 341-2; *McCaugher v Hieldon* 3 Eq 236
Lewis v Lewis 11 Ir R. Eq 110
referred to

(d) See S. 177 note

(e) J 1121-2

(f) See *Lakshmi v Kolhandarama*, 49 M L J 109 P C

(g) *Chichester v Coventry* L R 2 H L 71, 93

stated in some existing will as bequeathed by a father to a child, and subsequently a gift or other provision is made *inter vivos* with a view to benefit the same child, (then) this legacy after the testator's death is said to be adeemed by the second gift, etc., that is to say, it is satisfied thereby" (a). In ademption the former benefit is given by a will, which is a revocable instrument and which the testator can alter as he pleases, and consequently when he gives a benefit by deed subsequently to the will, he may, either by express words or by implication of law, substitute a second gift for the former. The legacy contained in the will is thereby adeemed, that is, taken out of the will. But where after a covenant to settle land or money a testator gives a benefit by his will to the same object, it will not have the effect of altering that covenant. But if the testator states that the legacy is to be in satisfaction of the covenant he necessarily gives the object of the covenant the right to elect whether he will take under the covenant, or whether he will take under the will. In cases of satisfaction the persons intended to be benefited by the covenant and the persons intended to be benefited by the legacy must be the same. In cases of ademption they may be and frequently are different (b).

4. Application of the rule to Hindu wills (c). The *prima facie* presumption against double portion has been applied to the case of a Hindu will as a principle of equity, justice and good conscience. In *Jugmandas v. Byrdas* (d) a testator directed by his will to set apart a sum of Rs 2000 for payment of the interest only to his son's daughter and, when she shall have a son born, ornaments for that amount for the son were to be purchased and delivered to her. The next day the testator had a credit entry of Rs 2000 made in the name of the son's daughter. The testator did not stand in *loco parentis* to the legatee, therefore no *prima facie* presumption against a double portion arose, and the provision by will was of a different nature from the provision of the credit entry, so it was held, the daughter being dead her heir was entitled to the amount and also to the legacy.

5. Subsequent provisions. The subsequent gift or other provisions mentioned may be made in any manner or connection, e.g., by way of a partial advance of a portion (e), or for setting up a son in business (f), or at any time, whether described as a portion or not (g).

CHAPTER XXII.

OF ELECTION.

180. (S. 167.) Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such

Circumstances in which election takes place.

- (a) *Ex. p. Pye*, 18 Ves. 140
 (b) *Chichester v. Coventry*, L. R. 2 H. L. 71, 90; see *Pole v. Somers*, 6 Ves. 309; *Hewitt v. Jardine*, 14 Eq. 58
 (c) M 539.
 (d) 7 Bom. L. R. 299

- (e) *Montague v. Sandwich*, 32 Ch. D. 525, 544; *Re Scott*, (1903) 1 Ch. 1.
 (f) *Leighon v. Leighon*, 18 Eq. 458
 (g) *Re Pollock*, 28 Ch. D. 552; *Re Lacon*, (1891) 2 Ch. 482. J. 1123 sq 7 Ed

shall do all in his power to confirm the instrument which he approbates his obligation is confined to his adopting the instrument as a whole and abandoning any right inconsistent with it (a) As has been said "The foundation of the doctrine of election is that no one shall claim under and in opposition to the same instrument" (b) The *quantum* of compensation is not what the Court looks to It is only concerned with seeing that a party deprived of a right vested in him is compensated by the gift of another property whatever may be its nature or duration of enjoyment (c)

7 Application of the rule For the purpose of election no distinction can be drawn between personal and real estate between specific and residuary legatees or between legatees and next of kin of an intestate (d) It is applicable to interests immediate or vested remote or reversionary, contingent of value or of no value (e) Where the property given away belongs to several persons each can separately elect (f) Where each member of a class has an independent right of election no one is bound by the decision of the majority (g) A remainderman is not bound by the election of the holder of the prior interest (h) Lastly whether a man leaves one testamentary writing or several testamentary writings it is the aggregate or the net result that constitutes his will or in other words the expression of his testamentary wishes and therefore for the purposes of election they are regarded as one instrument (i) similarly a deed under a power and a will (j) A volunteer under a will cannot take the benefit and at the same time wilfully defeat the expressed intentions of the testator (k) The doctrine was applied originally to wills but is now extended to cases of contracts and voluntary deeds

8 Where election does not arise The doctrine rests on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it (l) This general or presumed intention may however be repelled by the declaration in the instrument itself of a particular intention inconsistent with the general intention (m)

The particular intention may be expressed : e there may be an express provision in the will that in no case shall the doctrine of election be applied to it or may be implied in the will (n) The rule is not repelled merely by showing that its application was not in the contemplation of the testator (o)

The mere fact that a legacy or portion is said to be given in lieu or satisfaction of particular things expressed in the will shall not exclude the legatee from another

- (a) *Re Chesham* 31 Ch D 466 473
(see the various statements of the rule cited)
(b) *W 977 f n* (k) 12 Ed
(c) *Ammalu v Ponammal* 36 M L J 507
(d) *Cooper v Cooper* L R 6 Ch. 15 21
(e) *Dillon v Parker* 1 Swanst (409)
(f) *Wilson v Townshend* 2 Ves 693
(g) *Webb v Shaftsbury* 7 Ves 480
(h) *W 931 12 Ed T 110 8 Ed*
(i) *Ward v Baugh* 4 Ves 63
(j) *Fytche v Fytche* 7 Eq 494

- (h) *Long v Long* 5 Ves 445
(i) *Douglas Menzies v Umphelby* 1908 A C 224
(j) *Attkham v Smith* 1 Ves sen 259
(k) *Re Macarney* (1918) 1 Ch 300
(l) *Cooper v Cooper* L R 7 H L 53
(m) *Re Vardon's Trusts* 28 Ch D 124
revised on app 31 Ch D 275 279
(n) *Re Vardon's Trusts* 28 Ch D 124
31 Ch D 275, see *Dillon v Parker*
1 Sw 404 n
(o) *Re Bradshaw* (1902) 1 CI 436;
Haynes v Foster (1901) 1 Ch. 351

benefit, "for the Court will not construe it as meant in lieu of everything else, when he has said a particular thing" (a). Thus, where a testator gave an annuity to his wife, "to be accepted by her in lieu of her dower," and also gave her other benefits by the will (without mentioning whether these were in lieu of her dower or not) and she elected to keep her dower, *held*, she was entitled to the other benefits. Here there was no case of election properly speaking and the condition attached to the first gift cannot by implication attach to the rest (b). In such a case the testator must have known that the property was not his and in English law the principle applied on failure of such bequest is that of forfeiture and not compensation (c). It has also been said that ratification may be made of a bequest even if invalid but that is not a case of election (d). If a person whose property is given away by the testator be incompetent to release his property, he may take the benefit given to him under the will—this also is really not a case of election strictly speaking (e). The rule also does not say that a person who accepts a benefit under a will is precluded from some transaction of the testator which is not the subject of the will at all (f). The doctrine of election does not come into operation where the provision as to election conflicts with a rule of general law of the country based on public policy. But a bequest of ancestral property by will is not illegal in the above sense (g).

9. Mistake avoids election. An erroneous recital by the testator in his will that in giving a legacy to A he has taken into consideration the fact that A will have a large fortune from B will not give rise to an election (h). "There is no election if the property disposed of by the testator is not acquired by the beneficiary till after the testator's death" (i). The rights of the parties are to be ascertained as at the time of the testator's death in case of election (j). No case of election arises where a testator recognises the right of a person to whom he gives a legacy and does not deal with the property of that person as if it was his own (k). A gift by will not executed conformably to statute does not put a legatee to election (l). See also S 185 and 187 where election does not arise.

The rule as to election is to be applied as between a gift under a will and a claim *dehors* the will and adverse to it. Whether it is to be applied as between

(a) *Gast v Cook*, 2 Ves sen. 30, 33 explained in *Wilkinson v Dent*, 6 Ch 339

(b) *Brown v Parry* 2 Dick 685, but see *Wilkin on v Dent*, 6 Ch, 339. For other cases of gifts on condition of the legatees transferring properties of their own, see *Boughton v Boughton*, 2 Ves sen 12, *Re Sefton* (1893) 2 Ch 375; *Central Trust, &c v Snider*, 1916 A C. 266. See S 185

(c) T. 122 3 8 Ed

(d) *Parmanandas v Venayek*, 9 I A 86, 7 B 19

(e) *Re Chesham*, 31 Ch D 466, *reid* to in *Ammalu v Ponnammal*, 36 M L J 507; *Brown v Gregson*, 1920 A C. 860

(f) *Ramayya v. Mahalakshmi*, 64 I C 431.

(g) *Kishan v Narinjan*, 10 Lah 359

(h) *Box v Barrett*, 3 Eq 244; *Langslow v Langslow*, 21 Beav 552

(i) *Howells v Jenkins*, 2 J. & H 706, 32 L J Ch 788, *affd* *Grissell v Swinhoe*, 7 Eq 291; *Lady Cavan v Pulteney*, 2 Ves 544; 3 Ves 384 T. 110 8 Ed.

(j) *Re Chesham*, 31 Ch D 466, *Re Williams* (1915) 1 Ch 450

(k) *Re Wells' Trusts*, 42 Ch D 646; see *Kamal v Narendra*, 9 C. L. J 19 38

(l) E.g. gifts by wills made by infants, *Heare v Greenbank*, 3 Atk 695, 715, *Re Harris*, (1909) 2 Ch 206, *Re De Vire*, (1915) 1 Ch. 920. (here the will was not executed with due formality), *Re Ogilvie* (1918) 1 Ch 492 (gift defective under foreign law) W 983 12 Ed; see 1 Swast 405 6 (cases prior to the English Wills Act)

one clause in a will and another clause in the same will is not settled (a) No question of election arises on a question of construction as to which of two persons is entitled (b)

10 Election in case of gifts described in general words General words of description pass only property which belongs to the testator and not to others, even where the testator has no property answering to that description (c) Where a testator by general words directed his wife's ornaments to be distributed among his daughters the Court observed, her '*stridhan* ornaments would not be properly treated as falling within the clause if there were other ornaments which she wore and of which the testator had power to dispose (d) The rule is the same where property is described in reference to a particular locality (e) But where lands are described as in the testator's occupation (f), or the gift is specific (g), a case of election arises

11 Election where testator's interest is partial or future A question more difficult to answer is where a testator has disposed of the whole of his interest in some property when he had himself only a partial interest in it The general rule no doubt is, as laid down in S 90, that the description will be deemed to refer to and comprise the property answering that description at the death of the testator, and therefore the testator's interest only will pass and nothing more (h) But if the testator's intention be clear to dispose of the whole property, then a case of election will arise (i) Similarly, the question whether a testator having a reversionary interest intended to pass that interest only or an absolute interest in the property is to be determined from his intention upon a construction of the will (j) The supposed intention of the testator cannot prevail against an express declaration by him (k)

12 Election and powers The doctrine of election applies to powers For the purpose of election there is no difference between property and power (l) so that, if under a power to appoint to children, the donee of the power appoints to grandchildren which is bad, and the children who are entitled to claim by reason of the badness of the appointment, also take under the will other property, the grandchildren are entitled to put them to an election (m) But there is

- (a) *Wallaston v King* 8 Eq 165, distinguished in *Re Macartney* (1918) 1 Ch 300
 (b) *Wellinger v Wellinger* 9 Eq 301
Biz-e-j v Flight 3 Ch D 269
Douglas Menzies v Umpheley 1908 A C 224, but see *Re Macartney* (1918) 1 Ch 300 W 983 12 Ed
 (c) *Padbury v Clark* 2 Mac & G 293, see *Re Harris*, (1902) 2 Ch, 206
 (d) *Bai Mamubai v Dossa* 15 B 443 on app 24 I A 93, 21 B 709
 (e) *Randliffe v Parkyn* 6 Dow 149
Maddison v Chapman 1 J & H 470, but see *Usticke v Peters* 4 K & J 437, 455, J 524 7 Ed
 (f) *Honywood v Foster* 30 Beav 14
 (g) *Whitley v Whitley* 31 Beav 173.

- Grosvenor v Dursion* 25 Beav 97 T 116 8 Ed
 (h) *Henry v Henry* 1: R 6 Eq 286
 (i) *Padbury v Clark* 2 Mac & G 293, *Howells v Jenkins* 2 J & H 706, *Miller v Thurgood* 33 Beav 496, *Wilkinson v Dent*, 6 Ch 339, T 116
 (j) *Welby v Welby* 2 V & B 187, *Wintour v Clifton* 21 Beav 447, *Usticke v Peters* 4 K & J 437
 (k) *Randliffe v Parkyn* 6 Dow 149 J 523 4 7 Ed
 (l) *Blacket v Lamb* 14 Beav 482; *Cooper v Cooper* L R 7 11 L 53
 (m) *Re Heatherley* 27 Ch. D 686; *Re Wells Trusts* 42 Ch D 646

one exception, namely, when there is an appointment to an object of the power, with directions that the same shall be settled or subject to any condition then the appointment is valid and the superadded direction or trust or condition is void and inoperative to raise any case of election (a) No case of election arises where the appointment is void (b) nor where the testator improperly exercises the power so that the property goes as in default of appointment (c), nor where the testator gives no property of his own to the proper objects of the power (d)

13 Professes to dispose of The word *professes* does not mean simply purports but implies a capacity in the testator to make the disposition *eg.*, wills of infants (e) or of married women with restraint (f), do not raise a case of election But a Hindu widow does not suffer from any personal incapacity to devise immovable property inherited from her husband and is competent to raise a case of election (g)

14 Compensation or forfeiture In England the rule is that the person who elects against a will must render compensation to the disappointed legatee out of the benefit provided for him, but is entitled to the balance or surplus if any, left after rendering such compensation (h) The Courts of equity assume the jurisdiction to sequester the benefit intended for the refractory donee but as soon as this purpose is satisfied the surplus is made over to him (i) But in this country the section declares that the person electing against the will shall give up any benefits which may have been provided for him by the will In other words in England the rule of compensation prevails here that of forfeiture prevails (See S 181)

15 Effect of Election Where by reason of an election to take under the instrument property has been set free to pass under the instrument that property becomes subject to all the incidents it would have been subject to had it been throughout the property of the donor and therefore is liable to contribute *pari passu* with his other property in discharging his debts (j)

181. (S. 168). An interest relinquished in the circumstances stated in section 180 shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will

Devolution of
interest relinquished
by owner

- (a) See *Carver v Bowles* 2 R & M 301 *Blackell v Lamb* 14 Beav 452 *Churchill v Churchill* 5 Eq 44
(b) *Re Warren's Trust* 26 Ch D 203 *Re Wright* (1906) 2 Ch 283, *Re Nash* (1910) 1 Ch. 1 but see *Re Ogilvie* (1918) 1 Ch 497 V 931
(c) *Re Fowler's Trust* 27 Beav 362, *Re Nash* (1910) 1 Ch. 1
(d) *Bristow v Harde* 2 Ves. 336 350

- (e) See *ante*
(f) *Rich v Cockell* 9 Ves 376, *Blacklock v Grindle* 7 Eq 215, *Re Chesham* 31 Ch. D 466
(g) *Mangaldas v Ranchhodas* 14 B 438
(h) See *Gretton v Howard* 1 Swanst 409 433 note
(i) *Re McCortney* (1918) 1 Ch. 300
(j) *Re Williams* (1915) 1 Ch 450

The section. The section applies to the wills of Hindus, etc. Compare S 35 (1), Transfer of Property Act. It has been stated in the previous section that the English principle of compensation has not been adopted in this country but that of forfeiture has been engrafted in the Code. The person electing must therefore give up all benefits provided for him by the will. This section goes on to say that the interest thus relinquished by the person electing against the will devolves, as if undisposed of by the testator, on the heir. The heir, however, must render compensation to the disappointed legatee. Of course, no question of compensation arises if the person put to his election elects to take under the will (a).

The rule. "In our Courts we have engrafted upon this primary doctrine of election, the equity, as it may be termed, of compensation. Suppose a testator gives his estate to A, and directs that the estate of A, or any part of it, should be given to B. If the devisee will not comply with the provisions of the will, the Courts of Equity hold that another condition is to be implied as arising out of the will, and the conduct of the devisee, that in as much as the testator meant that his heir at law should not take his estate which he gives to A, in consideration of his giving his estate to B, if A refuses to comply with the will, B shall be compensated by taking the property, or the value of the property, which the testator meant for him out of the estate devised, though he cannot have it out of the estate intended for him" (b).

Compensation. It is the liability to compensation that distinguishes equitable election from election by a *cestui que trust* to adopt a breach of trust committed by a trustee (in which case he is not entitled to compensation) (c), or from confirmation of a voidable instrument (d), or from a gift with a condition (e). Before the question of compensation can arise there must be a free gift of property to the legatee electing against the will out of which compensation is to be made (f). The amount of compensation and the rights of the parties are to be ascertained at the testator's death (g).

182. (S 169.) The provisions of sections 180 and 181 apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own

Testator's belief as to his ownership immaterial

Illustrations

(i) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees

- (a) *Re Chesham*, 31 Ch D 466. See S 182 illust (i)
 (b) *Ker v Wanchope*, 1 Bl 1, 25 cited in *Re Chesham*, 31 Ch D 466, 473-4
 (c) *Patten v Guardians &c.*, 52 L J Ch 787
 (d) *Vidls v O'Hagan* (1900) 2 Ch 87,

- Parmanandas v Venayek* 9 I A 56, 7 B 19
 (e) See *Ante*
 (f) *Brislow v W'arde* 2 Ves 336; see *Wollaston v King* 8 Eq 165.
 (g) *Re Chesham* 31 Ch D 466, *Re Hancock* (1905) 1 Ch 16

goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be

(ii) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel or to lose the estate

(iii) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death B must elect to give up the estate or to lose the legacy.

(iv) A, a person of the age of 18 domiciled in British India but owning real property in England, to which C is heir at law, bequeaths a legacy to C and, subject thereto, devises and bequeaths to B "all my property whatsoever, and wheresoever," and dies under 21 The real property in England does not pass by the will C may claim his legacy without giving up the real property in England

The section. The section applies to the wills of Hindus *etc* Compare S 35 (2) of the Transfer of Property Act Election will arise whether the testator was or was not aware that the property disposed of by him did not belong to him, it is sufficient that he has in fact, disposed of property which is not his own It is independent of such knowledge on the part of the testator (a) Nothing can be more dangerous than to speculate upon what the testator would have done if he had known the real state of things (b) Where however, the gift is conditional on the testator having power to dispose of the property in question election does not arise (c)

Illustrations Illustration (i) shows how the compensation to be paid to the disappointed legatee is to be ascertained In illusts (ii) and (iii) the doctrine of election has been applied to contingent interests It has been said already that the doctrine applies "to interest immediate, remote, contingent of value, or not of value" (d) With regard to illust (iv) the rule has been thus stated — "Where a testator bequeathed a legacy to the heir-at law of his English freeholds but failed to satisfy the formalities required for devising his English freeholds the English heir could not, in the absence of an express condition attached to the legacy (e), be compelled to give effect to this devise by the doctrine of election" (f), but this "exemption from the obligation to elect does not extend to an heir of foreign land, even though the devise of the foreign land is void under some positive rule of foreign law and not merely for lack of formality" (g) Evidently the Legislature thinks that the minority of the testator makes the will defective 'for lack of formality' Anyway

- (a) *Thellusson v Woodford* 13 Ves 209, *Welby v Welby* 2 V & B 187, *Coutts v Acworth* 9 Eq 519, *Re Brooksbank* 34 Ch D 169, *Re Harris*, (1909) 2 Ch 206 J 514 7 Ed
(b) *Whistler v Webster* 2 Ves 367 *Cooper v Cooper* 6 Ch 15
(c) *Church v Kemble* 5 Sim. 525
(d) *Wilson v Townshend*, 2 Ves 693,

- Webb v Shaftesbury*, 7 Ves 480
See S 180 note 7
(e) *Boughton v Boughton*, 2 Ves sen 12
(f) *Hearle v Greenbank*, 3 Atk 695; see *Dillon v Parker*, 1 Swanst 359, 436 n
(g) W 982 3 *Allen v Anderson* 5 Hare 163, *Re Ogilvie*, (1918) 1 Ch 492.

it is not clear why this technical rule of English law has been introduced in this illustration. It should be noted that wills of immovables are governed by *lex situs* (law of the place where the property is situate) and that of personal property by *lex domicilii* (law of domicile) so far as the formalities for the execution of the will are concerned (a)

Bequest for man's benefit how regarded for purpose of election.

183. (S. 170.) A bequest for a person's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultanpur Khurd being the property of B, A bequeathed it to C and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it.

Person deriving benefit indirectly not put to election

184. (S. 171.) A person taking no benefit directly under a will, but deriving a benefit under it indirectly, is not put to his election.

Illustration

The lands of Sultanpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultanpur to B, and 1000 rupees to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1000 rupees and accounts to B for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultanpur in opposition to the will.

The section The section applies to the wills of Hindus, etc. Compare S. 35 (3) Transfer of Property Act. As has been already said a case of election arises when there is 'on the face of the will a disposition on the part of the testator of something belonging to a person who takes an interest under the will' (b). No election arises where there is no gift under the will. Thus where a person who has a special power of appointment appoints the property to persons who are objects and to those who are not objects, but does not give any property of his own to the former, no case of election arises (c); but where he does give his own property to the proper objects of the power, then such legatees must elect (d).

(a) *Pepin v. Brugere*, (1900) 2 Ch. 504
(b) T. 115
(c) *Brislow v. Ward*, 2 Ves. 336, 350
(d) *White v. White*, 22 Ch. D. 555,

Re Whealley, 27 Ch. D. 606;
Re Lord Chesham 31 Ch. D. 466,
477

The rule therefore is that there must be a taking away of property from a person and the making of a gift to that person in order to raise a case of election. In the illustration there is no gift to D although D, as the administrator of C, elects to take under the will and therefore gets the legacy of Rs. 1,000 he does not lose his lands under the settlement in opposition to the will, because he gets no benefit directly under the will (a). The illustration also shows that election may be made by an executor or administrator.

Person taking in individual capacity under will may in other character elect to take in opposition

185. (S. 172) A person who in his individual capacity takes a benefit under a will may, in another character, elect to take in opposition to the will.

Illustration

The estate of Sultanpur is settled upon A for life, and after his death, upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.

The section. The section applies to the wills of Hindus etc. Compare S 35 (4) Transfer of Property Act. A person enjoying a dual capacity may in one capacity take under a will and in another capacity in opposition to the will. Thus the doctrine of election is not applicable against a creditor taking a benefit under a will for payment of debts and also enforcing his claim against the estate because the former is claimed in the capacity of a legatee and the latter is a personal right (b). Nor is a legatee claiming under a will precluded from enjoying a derivative interest to which he is entitled at law, e.g., a husband may take as a tenant by the courtesy lands retained by his wife electing against a will under which he accepts benefits (c).

In the illustration C does not lose his right to claim in his individual capacity the legacy given to him though in opposition to the will in another capacity, viz., that of an administrator, he chooses to retain the estate. Very different would have been the result if B had died in the lifetime of the testator. The estate of Sultanpur having then become vested in C, C would have been called upon to elect whether he would retain the estate or take the legacy. 'The obligation (to elect) attaches on whoever at the testator's death is the true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will' (d) and in case of a vested legacy election may be made by the executor or administrator or heir (e).

(a) See *Cavan v Pulteney*, 2 Ves 544, 3 Ves 384, see *Dillon v Parker*, 1 Swanst 359.
(b) *Kidney v Coussmaker*, 12 Ves 136, *Cooper v Cooper*, L. R 7 H. L. 53, 66.

(c) *Cavan v Pulteney*, 2 Ves 544 3 Ves 384, *Brodie v Barrie*, 2 V & B 127. See 1 Swanst 408 note.
(d) J 511, 7 Ed.
(e) W 706 7, 11 Ed.

186. (S. 172. Ex.) Notwithstanding anything contained in sections 180 to 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life A by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees The widow elects to take what she is entitled to under the settlement She is bound to relinquish the annuity but not the legacy of 1,000 rupees

Change. The section formed the Exception to 172 of the old Act The words 'Notwithstanding to 185' are new.

The section. The section applies to the wills of Hindus, *etc* See S. 35 (4 Exception) Transfer of Property Act The ordinary rule is that the "person electing must elect to take under or against the whole instrument, will and codicils, and not merely that part of it which disposes of his own property" (a). For the purpose of election two contemporaneous instruments which effectuate one entire disposition are regarded as one instrument (b) But the application of the doctrine of election is excluded by an apparent expression of intention by the testator that only one of the gifts to the legatee is conditional on his giving up what the testator purports to take away from him.

Cases. Where a testator gave a piece of property belonging to his eldest son to his second son and among the gifts to the eldest son mentioned one as given to him in lieu of what is taken away from him, *held*, the election was confined to these two pieces of property, "for the Court will not construe it as meant in lieu of everything else, when he has said a particular thing" (c) Where legacies were given to two persons in satisfaction of certain demands of theirs against the estate, *held*, as this was a testamentary bounty to the person whose estates and rights were under another part of the will interfered with, the legatees were put to their election (d) In *Pramada Dasi v Laksi Narain* (e) a testator gave to his nephew his brother's widow's share of the ancestral property and made a suitable provision for her maintenance and worship Two years after the testator's death she sued to enforce the provision made for her by the will

(a) *Cooper v Cooper*, 6 Ch 15 *Re Vardon's Trust*, 31 Ch D 275, 279
(b) *Kirkham v Smith* 1 Ves. sen 258 (deed); *Bacon v Cook*, 4 D C & S. 261; *Douglas McKenzie v*

Umphelby, 19'8 A C. 224 T 107
(c) *East v. Cook*, 2 Ves. sen 30
(d) *Wilkinson v Dent*, 6 Ch 337 See *Coutts v Ackworth*, 9 Eq 519.
(e) 12 C 62.

and got a decree Several years after she claimed the ancestral property, held, she had elected under the will when she sued for maintenance, which she must have known was given to her in lieu of her share in the ancestral property, and therefore she was precluded from bringing this suit

187. (S 173) Acceptance of a benefit given by a will constitutes an election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances

When acceptance of benefit given by will constitutes election to take under will

Illustrations

(i) A is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son B will be absolutely entitled The will of A gives the estate of Sultanpur Khurd to B and the estate of Sultanpur Buzurg to C B in ignorance of his own right to the estate of Sultanpur Buzurg allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd B has not confirmed the bequest of Sultanpur Buzurg to C

(ii) B the eldest son of A, is the possessor of an estate called Sultanpur A bequeaths Sultanpur to C and to B the residue of A's property B having been informed by A's executors that the residue will amount to 5000 rupees allows C to take possession of Sultanpur He afterwards discovers that the residue does not amount to more than 500 rupees B has not confirmed the bequest of the estate of Sultanpur to C

The section The section applies to the wills of Hindus etc Compare S 35 (5) Transfer of Property Act

When election can be by conduct According to this section election need not necessarily be made by words but may be by conduct : e by a series of unequivocal acts (a) But for election by conduct to arise a person bound to elect must know his rights the material facts on which they depend, and also must act with an intention to elect (b) It is true, as a general proposition that knowledge of the law must be imputed to every person but it would be too much to impute knowledge of this equity, election as a question of intention, of course, implies knowledge 'In order that a person who is put to his election should be concluded it, two things are necessary First, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them Second, an intention to elect manifested either expressly, or by acts which imply choice

(a) *Spread v Morgan*, 11 H. L. C. 58^a

(b) *Morgan v Edwards* 1 Bl. N. S. 401; *Wilson v Thornbury* 10 Ch

239, see *Pramada v Laksh Narain* 12 C. 60 cited under previous S see *Lal v Naradmo*, 100 I. C. 339

and acquiescence (a) In case of a person ignorant of his title any proof of acquiescence which could amount to an election *must be sought for in some subsequent unequivocal act of the legatee shewing an indication to take under or against the will* (b) 'A person is not bound to elect until all the circumstances which may influence his election are known to him and an election made in ignorance of material facts is not binding' (c)

In order to determine therefore, what acts of acceptance or acquiescence constitute an implied election the following questions are relevant — Whether the parties acting or acquiescing were cognisant of their rights? Whether they intended election? Whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed? Whether these enquiries are precluded by lapse of time (d)? A party bound to elect is entitled first to ascertain the value of the funds (e) and may sustain an action to have all necessary accounts taken (f) Sir Whitley Stokes is of opinion that such a suit lies in the High Court, but in the moffussil unless perhaps under O 36 r 11 and r 12 of the Civil Procedure Code no provision seems to exist for such a case under the Code of Civil Procedure or otherwise (g)

An election under a misconception of the extent of the claim on the fund elected is not conclusive (h) Where a testator made a provision for his widow, expressly in lieu and satisfaction of any estate or interest to which she might be entitled as his widow, out of his real and personal estate, and the widow enjoyed the provision thus made in ignorance of her right to dower, held, 16 years after the testator's death that she was entitled to elect Of course if she was called upon to elect she would have to do so within a reasonable time but then it would have been necessary that she should have known the nature and extent of her rights what her dower was and what she was entitled to to enable her to determine what choice she should make (i) Where a person has received benefits under a will but elected to take against it he must repay the amounts received These form a first charge over the property he has elected to retain (j)

- (a) *Spread v Morgan* 11 H L C 588 see *Worthington v Wiginton* 20 Beav 67, 74 (see cases discussed) *Chalmers v Storil* 2 V & B 222, *Douglas v Douglas* 12 Eq 617 J 529 7 Ed
(b) *Spread v Morgan*, 11 H L C 588
(c) J 529 7 Ed *Wake v Wake* 1 Ves 335, *Kidney v Cousmaker* 12 Ves 136, *Dillon v Parker* 1 Swanst 359 1 Cl & F 303, *Douglas v Douglas* 12 Eq 617 reld to *Indubala v Manmatha* 41 C. L. J 258 87 1 C. 404
(d) *Hilson v Towserend*, 2 Ves 693, *Butricke v Broadhurst* 3 Bro C C. 68 *Wake v Wake* 1 Ves 335, *Simpson v Vickers* 14 Ves. 341 and other cases cited in *Dillon v Parker* 1 Swanst 359 note *Grisell v Spinkhoe* 7 Eq 291, *Cooper v*

- Cooper* 6 Ch 15, L R 7 H L 53
(e) *Wake v Wake* 3 Bro C C 255, *Chalmers v Storil* 2 V & B 222
(f) *Butricke v Broadhurst* 1 Ves 171, *Pusey v Desbouverie* 3 P W 315
(g) M 554
(h) *Kidney v Cousmaker* 12 Ves 136 see illust (ii)
(i) *Sopwith v Maughan* 30 Beav 235 reld to in *Triguna v Radharani* 37 C L J 20 28, *Indubala v Manmatha* 41 C L J 258 279, *Wake v Wake* 1 Ves 335
(j) *Codrington v Codrington* 8 Ch 578 L R 7 H L 854, *Carter v Silker* (1891) 3 Ch 553, (1892) 2 Ch 278, (reversed on another point), 1893 A C 360, but see *Greenwood v Penny* 12 Beav 403 (this equity not recognised)

188 (S 174) (1) Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent

Circumstances in which knowledge or waiver is presumed or inferred

(S 175) (2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done

Illustration

A bequeaths to B an estate to which C is entitled and to C a coal mine C takes possession of the mine and exhausts it He has thereby confirmed the bequest of the estate to B

1 The section This section applies to the wills of Hindus etc See S 35 (6 and 7) Transfer of Property Act

2 Two years The limitation of this period is novel but likely to be useful (a) No such rule prevails in England Election in English law has been kept open for several years (b) A party having an equity to compel an election does not forfeit that equity by delay in enforcing it (c)

3 Shall be presumed No such presumption is drawn in England on the contrary it has been said great injustice might be done if it were presumed from the fact of continuing in possession that a party intended to decide a question which it does not appear that he was ever required to consider (d) Thus where a person who is bound to elect between two estates continues without being required to elect to be in possession of both for many years such possession and enjoyment inasmuch as it affords no proof of preference cannot be an election to take one of the estates and to reject the other (e)

Where however a person bound to elect has for a long series of years taken that to which he was only entitled if he claimed under the will or dealt with the property given to him by the will as his own the Court may infer from the facts that the person by his conduct has shewn conclusively that he intended to make an election (f) So also in *Indubala v Manmatha* (g) there being no evidence that

(a) Stokes 130

(b) *Buttrick v Broadhurst* 1 Ves 171
see *Wake v Wake* 1 Ves 335,
Giddings v Giddings 3 Russ 241

(c) *Spread v Morgan* 11 H L C 588 617

(d) *Spread v Morgan* 11 H L C 588 606

(e) *Dillon v Parker* 1 Swanst. 359
380 *Padbury v Clark* 2 Mac &

G 298 confmd J 529

(f) *Spread v Morgan* 11 H L C 588 612
Bruscoe v Bruscoe 1 Jo & L 334
Dewar v Mailland 2 Eq 834
Worthington v Wighton 20 Beav 67
J 529 7 Ed See
Pramada v Lakhi 12 C 60

(g) 41 C. L. J 258 279, 87 1 C 404

the will was explained to a legatee (a woman) or that the executors ever called upon her, as they were required to do under S 189, to make her election, *held*, that even after enjoyment of the benefits for two years no presumption arose of waiving an inquiry or possessing the necessary knowledge

4. Sub-clause (2). It lays down a rule, recognised in England, namely, that a right to elect may be lost. The rule is not confined to testamentary matters only (a).

5 *Inferred*. "That election may be inferred from the circumstances, and the acts of the persons bound to elect, is not an open question" The burden of proof lies on the party alleging that election has been made (b). "There may be a series of unequivocal acts, from which an intention to elect, and the fact of actual election, may be inferred" (c). Sub S (2) differs from sub S. (1) in that it only permits an inference to be drawn (d).

6 Place the persons, etc Lapse of time will not be a bar to an election "unless it can be shown that injury would result to third persons by the delay" (e).

189 (S. 176). If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of

When testator's representatives may call upon legatee to elect

that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

The section. The section applies to the wills of Hindus, etc. Compare S 35 (8) Transfer of Property Act. The rule is meant to apply to a person not under disability. In *Sopwith v Maughan* (f) Sir J Romilly, M.R. asks. "When is a widow bound to make an election?" and states, "It certainly is not necessary that she should do so within 24 hours of the testator's death and if the matter had come before the Court it would have given her some reasonable time to consider. It is also perfectly clear, that the parties interested under the will might have called on her categorically to elect and the Court might not consider 12 months after the testator's death an unreasonable time."

It is the duty of an executor to call upon a legatee to make his election (g)

190. (S. 177.) In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Postponement of election in case of disability

- (a) See S 35 (7) T.P.A. It has been applied to contracts *Syud Talab v. Jmeer*, 22 W. R. 529.
(b) *Northington v Wiginton*, 20 Beav 67, 74; see *Pramada v Lakht Narain*, 12 L. 60
(c) *Spread v Morgan*, 11 H L. C. 599

- (d) *Indubala v. Manmatha*, 41 C L J 258; 87 L C. 494
(e) J 528, 7 Ed *Spread v Morgan*, 11 H. L. C 599, 617.
(f) 30 Beav 235
(g) *Indubala v. Manmatha*, 41 C.L.J. 258, 279

The section The section applies to the wills of Hindus *etc* See S 35 (9) Transfer of Property Act This section states that election is postponed by disability Thus an infant cannot elect till the removal of his disability (a) but in recent cases the Court has elected for the infant and has directed where necessary an inquiry whether it will be advantageous to the infant to take under or against the will (b) In case of a lunatic so found by inquisition the Court in England has power to elect for him (c) For the case of a married woman with restraint see English text books

CHAPTER XXIII

OF GIFTS IN CONTEMPLATION OF DEATH

191. (S 178) (1) A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will

Property transferable by gift made in contemplation of death

(2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness

(3) Such a gift may be resumed by the giver, and shall not take effect if he recovers from the illness during which it was made, nor if he survives the person to whom it was made

Illustrations

(i) A being ill and in expectation of death delivers to B to be retained by him in case of A's death —

a watch

a bond granted by C to A

a bank note

a promissory note of the Government of India endorsed in blank

(a) *Boughton v Boughton* 2 Ves sen 12
Streatfield v Streatfield Cal Talb 176

(b) See *Grillon v Haward* 1 Swanst 409 and note
Brown v Brown 2 Eq 481, *Re Montagu* (1896) 1 Ch 549
Re Barnett 1900 W

N 81 *Cooper v Cooper* L R 7 H L 53 J 527 7 Ed
(c) *Re Sefton* (1898) 2 Ch 378
Whether in case of a lunatic not so found the Court can elect, see same case and also *Wilderv P golf* 22 Ch D 263

the will was explained to a legatee (a woman) or that the executors ever called upon her, as they were required to do under S 189, to make her election, *held*, that even after enjoyment of the benefits for two years no presumption arose of waiving an inquiry or possessing the necessary knowledge

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When testator's representatives may call upon legatee to elect

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It is the duty of an executor to call upon a legatee to make his election (g)

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(b) *Worthington v. Winton*, 20 Beav 67, 74. see *Thamada v. Lathi* *Narain*, 12 C. 60
Spread v. Morgan, 11 H L C. 549

(d) *Indubala v. Manmatha* 41 C. L. J. 258; 87 I C. 404
(e) J. 528, 7 Ed *Spread v. Morgan*, 11 H. L. C. 559, 617.
(f) 30 Beav 235
(g) *Indubala v. Manmatha*, 41 C. L. J. 258, 279

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(3) Such a gift may be resumed by the giver ; and shall not take effect if he recovers from the illness during which it was made ; nor if he survives the person to whom it was made.

Illustrations

(1) A, being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death —

a watch

a bond granted by C to A

a bank note

a promissory note of the Government of India endorsed in blank .

(a) *Boughton v Boughton*, 2 Ves sen 12, *Streetfield v. Streetfield*, Cat Talb 176

(b) See *Grillon v Hazard* 1 Swanst 409 and *no c.*, *Brown v Brown*, 2 Eq 481, *Re Montagu*, (1896) 1 Ch. 549, *Re Barnett*, 1900 W

N 61, *Cooper v Cooper* L. R. 7 H L. 53 J 527 7 Ed
(c) *Re Sefton* (1898) 2 Ch 378
Whether in case of a lunatic not so found the Court can elect, see same case and also *Wilder v Pigott*, 22 Ch. D 263

a bill of exchange endorsed in blank
certain mortgage deeds

A dies of the illness during which he delivered these articles

B is entitled to—

the watch

the debt secured by C's bond

the bank note

the promissory note of the Government of India

the bill of exchange

the money secured by the mortgage deeds

(ii) A being ill and in expectation of death delivers to B the key of a trunk or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk or over the deposited goods and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents or to A's goods of bulk in the warehouse.

(iii) A, being ill and in expectation of death puts aside certain articles in separate parcels and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

1 Donatio mortis causa This is a form of gift which has been recognised in most systems of law. This section is not applicable to the wills of Hindus (see Sched III S 57) or of Muhammadans (See s 58). But gifts of an analogous nature were not unknown in Hindu law (a). Under Muhammadan law also such gifts were recognised (b). It can be traced back to civil law whence the name *donatio mortis causa*.

2 Incidents of donatio The incidents attached to a gift of this kind are (1) It is incomplete during the life of the donor. (2) It may be revoked by him at any time before his death. (3) It must be accompanied by delivery but there may be a good *donatio mortis causa* of an instrument which does not pass by delivery, then the executors are trustees for the donee. (4) If the donor recovers from the condition of contemplation of death the inchoate gift comes to an end. (5) The death of the intended donee before the donor has the same effect (c).

3 Characteristics It will be seen that one characteristic of a gift as contemplated by the section is that it is conditional therefore title does not pass absolutely to the donee on delivery as in the case of a gift. It may be resumed by the donor and fails to take effect if he recovers or the donee dies before him. An absolute gift to take effect immediately cannot be considered as a *donatio mortis causa*. Again it differs from the property left by a deceased person in the

(a) *Upendra v Nalla* 3 B L R O C 113
Lusatchmi v Saba 6 M C R 270, *Sudjassak v Ram* 17 C 620
(b) *Jal v Mohammad* 42 C 477

34 C L J 444 *Flanagan v Colam* 3 C W N 57
(c) *Agnew v Belfast &c* (1876) 2 L R 234 213 W 479 12 Ld

fact that the interest in the thing given does not vest in the heir or the personal representatives if the conditions laid down in the section are complied with. Therefore the pleadings must show facts that those conditions have been satisfied and that the transaction has amounted to a valid *donatio* (a). A *donatio* is obviously different from a legacy, having nothing to do with a will, although the subject-matter of such a gift has been held to be akin to a legacy and so, if fraudulent, is bad as against creditors (b).

4. Difference between a legacy and a *donatio*—(i) The gift is not made by a will, (ii) probate is unnecessary, for it takes effect from delivery (c), (iii) assent of the executor or administrator is unnecessary (d), (iv) the subject-matter does not pass to the executor as such.

5. Difference between a gift and a *donatio* (i) It is revocable during the donor's life, (ii) it is liable to legacy duty, (iii) it is liable for the debts of the testator upon deficiency of assets (e), (iv) the donor does not part with the whole of his interest until his death takes place (f).

6. Subject-matter of a *donatio* (g) "Any property is a possible subject for a *donatio mortis causa*" (h), i.e., anything the property in which can either be transferred by delivery (i) or can be acquired by the donee with the assistance of a Court of Equity (j) e.g., (i) bank notes (l), (ii) negotiable instruments, even unendorsed (l), (iii) cheques payable to donor or order and unendorsed by him (m); (iv) mortgage (n) (v) policy of insurance (o), (vi) money due on a banker's deposit note (p), (vii) bonds (q) (viii) money in Post Office Savings Banks (r).

7. Things which are not subject-matters of *donatio*: (i) certificates of building societies (s) (ii) railway stock (t) (iii) receipts for annuities or certificates (u), (iv) promissory note executed by donor (v), (v) money in Post Office Savings Bank but invested in Government stock (u), (vi) money in Private Savings Bank (x) (vii) a part of the money due on banker's deposit note (y), (viii) cheque of the donor (z). The mere delivery of a cheque is not enough,

(a) *Re Parton* 45 L. T. 755 W. 479 12 Ed.

(b) *Tate v. Hilt* 2 Ves. 119, *Smith v. Casen* 1 P. W. 476.

(c) *Ripden v. Waller* 2 Ves. sen. 258.

(d) *Tate v. Hilt* 2 Ves. 119 W. 485.

(e) *Smith v. Casen* 1 P. W. 406.

(f) *Hard v. Turner* 2 Ves. sen. 234.

(g) *Edwards v. Jones* 1 My. & C. 226.

(h) W. 483 sq. 12 Ed.

(i) *Re Hasebury* (1915) 1 Ch. 195.

(j) *Miles v. A' et* 3 P. W. 356.

(k) *Donald v. Hulse* 1 P. W. 477.

(l) *A' et v. A' et* 3 P. W. 356.

(m) *Leal v. Leal* 27 Beav. 323. *Re A' et* 15 Ch. D. 651. *Re A' et* 27 Beav. 329.

(n) *Clement v. Cheesman* 27 Ch. D. 651.

(o) *Donald v. Hulse* 1 P. W. 477.

497, see *Re D'lon* 44 Ch. D. 76, *Re Beaumont*, (1902) 1 Ch. 859.

(a) *Am v. Hilt*, 33 Beav. 619.

(f) *Moore v. Moore*, 18 Eq. 474; *Re D'lon*, 44 Ch. D. 76.

(g) *Gardner v. Parker* 3 Macd. 184.

(h) *Re Weston* (1902) 1 Ch. 640.

(i) *Re Andrews* (1902) 2 Ch. 374.

(j) *Re Weston*, (1902) 1 Ch. 640.

(k) *Moore v. Moore* 18 Eq. 474.

(l) *Hard v. Turner* 2 Ves. sen. 431.

(m) *Re Leeger* (1916) 1 Ch. 577.

(n) *Re Andrews* (1902) 2 Ch. 374.

(o) *Re Lee* 1918 2 Ch. 334.

(p) *Re Weston* 1902 1 Ch. 640.

(q) *Re Weston* 15 Ch. D. 651.

(r) *Re Beaumont* (1902) 1 Ch. 859.

(s) *Re Weston* 15 Ch. D. 651.

(t) *Re Weston* 15 Ch. D. 651.

but the cheque must be paid or presented for payment before donor's death hence it has been said it cannot be given in contemplation of death (a)

3 Analysis of the section The section applies (i) to movable property which the deceased could dispose of by will, (ii) where the gift is made in contemplation of death, *i.e.*, by a person who is ill and expects to die shortly of his illness, (iii) where there is delivery to the donee, (iv) the gift is resumable and conditional on the donor dying of the illness during which it was made or before the donee, (v) it takes effect if the donor dies of the illness during which it was made (b)

(i) *Movable property* Ordinarily the rule is confined to movable properties because it is in respect of them only that interest passes by delivery. Where delivery will not effect a complete gift *inter vivos*, it cannot create a *donatio mortis causa* because it will prevent the property from vesting in the executors (c). But in cases where delivery gives no good legal title it makes the executors trustees for the donee and they must do what is necessary to perfect the transfer (d). The reason is that the Court does not regard the title in the donee to be vested by the gift, but that it so vested that he can call upon the executor to carry into effect the intention manifested by a person whom he represents. Where the donor's act therefore is incomplete, the question arises, not what the donor can be compelled to do, but whether the executor cannot be compelled to complete it, he being considered as a trustee for the donee, so as to make the gift binding on the estate (e).

A mortgage deed it has been held, can be made a subject of a *donatio mortis causa*, so that the property in the deeds and the right to recover the money secured by them passed by delivery and the personal representatives are trustees for the donee and it is their duty to make the gift effectual (f).

(ii) *Gift made in contemplation of death* In order to constitute a good gift it must have been given in contemplation of death (g), where not so made the gift can not be valid (h). The evidence of the gift being made in contemplation of death must be of the clearest and the most unequivocal character. The onus lies on the donee to establish this fact (i). It is not necessary that the claimant's testimony should be corroborated by further evidence (j).

The gift, however, need not be made in *extremis* but if the donor dies within a few days it will be presumed to have been given in contemplation of death (k). There must be evidence of some circumstance of the immediate appearance of the death

- (a) W. 484 See authorities cited
 (b) See *Cain v Moon* (1895) 2 Q B 283
 (c) *Duffell v Elmes* 1 Bl N S 497, 533
 (d) *Moore v Darton* 4 D G & S 517, *Re Dillon* 44 Ch D 76 W 484 485 12 Ed
 (e) *Duffell v Elmes* 1 Bl N S 497, *Re Dillon* 44 Ch D 76 See *Sullivan v Ram* 17 C. 620

- (f) *Duffell v Elmes* 1 Bl N S 497
 (g) *Duffell v Elmes* 1 Bl N S 497
 (h) *Tate v Ilbert* 2 Ves 119, *Gardner v Parker* 3 Madd 185, See *Re Richards* (1921) 1 Cl 513
 (i) *Cornahan v Gilce* 15 Moo P C 215 W 479 12 Ed
 (j) *Re Weston* (1932) 1 Cl 687
 (k) *Blount v Burrow* 4 Bro C C 79 W 479 *Hykes*, Bl N S 497 18 Ed 176-7 1

of the testator at the time of the gift. The mere fact that at the time the testator is in a low state but not in a dangerous way will not make a gift good even if the donor were to die shortly thereafter (a). A gift in contemplation of suicide does not constitute a valid *donatio* (b).

The word shortly does not mean within a few days. The gift has been held to be good even where made several weeks before actual death (c).

(iii) *Delivery of possession to the donee*. Actual delivery is essential (d). A mere symbolical delivery will not be effective (e) nor is a verbal gift enough (there must be change of possession) (f) nor a mere intention to deliver. Thus where a testator caused monies etc. to be sealed in three different parcels and directed that they should be given to the legatees whose names were put on the parcels after his death and the parcels were then replaced in the chest held as there was no actual delivery and the testator had resumed possession there was no *donatio* (g). So where the deceased just before her death told B to take the keys of a dressing case containing trinkets and on her death to deliver them to the plaintiff held, this did not constitute a valid *donatio* (h).

It has been held further that 'delivery' means the deceased not only parting with possession but also with dominion over the subject of the gift. There must be an unequivocal intention to give (i). Where dominion is not intended to be parted with there is no valid *donatio* (j). Delivery however, need be at the actual moment of the gift (k). Antecedent delivery will be good provided the capacity in which the chattel is held is changed when the *donatio* is effected (l). Delivery to an agent of the donee will be good (m) but not to an agent of the donor (n).

Delivery may be (1) complete such as would be sufficient in the case of an ordinary gift and as in the case of a *donatio mortis causa* would necessitate a retransfer to the donor should he recover or (2) an inchoate delivery or transfer, such as would not be sufficient in the case of an ordinary gift and as in the case of an intended *donatio* would require something further to be done by the representatives of the donor after his death. Delivery of the key of a box is transfer of dominion over the goods in the box (o). Delivery of a key is not the delivery of a

- (a) *Tate v Hilbert* 4 Bro C C 286
Agnew v Belfast &c (1896) 2 Ir R 204 W 480
 (b) *Re Dadman* 1925 Ch 553 following above case.
 (c) *Gardner v Parker* 3 Madd 184
Duffield v Hicks (or Elmes) 1 Bl N S 497
 (d) *Cosnahan v Gnce* 15 Moo P C 215
Bunn v Markham 7 Taunt 231
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Agnew v Belfast &c (1896) 2 Ir R 204 W 480 sq 12 Ed
 (e) *Ward v Turner* 2 Ves sen. 431
 (f) *Irons v Smallpiece* 2 B & Ald 531, *Surendra v S S for Ind a* 34 C 207 5 C. L. J 390
 (g) *Bunn v Markham* 7 Taunt 231

- See illust (iii)
 (n) *Powell v Hellicar* 28 L J Ch 355
 (i) *Hawkins v Blewitt* 2 Esp N P C 663 5 R R 761 *Re Wasserberg* (1915) 1 Ch 195 W 482 12 Ed
 (j) *Solicitor &c v Lewis* (1900) 2 Ch 812
 (k) *Re Weston* (1902) 1 Ch 650
 (l) *Can v Moon* (18 6) 2 Q B D 283
 (m) *Drury v Smith* 1 P W 403
Bunn v Markham 7 Taunt 231 W 491
 (n) *Powell v Hellicar* 28 L J Ch 355 *Farquharson v Cate* 15 L J Ch 137
 (o) *Re Wasserberg* (1915) 1 Ch 195

but the cheque must be paid or presented for payment before donors death hence it has been said it cannot be given in contemplation of death (a)

8 Analysis of the section The section applies (i) to movable property which the deceased could dispose of by will, (ii) where the gift is made in contemplation of death i.e. by a person who is ill and expects to die shortly of his illness (iii) where there is delivery to the donee, (iv) the gift is resumable and conditional on the donor dying of the illness during which it was made or before the donee (v) it takes effect if the donor dies of the illness during which it was made (b)

(i) *Movable property* Ordinarily the rule is confined to movable properties because it is in respect of them only that interest passes by delivery Where delivery will not effect a complete gift *inter vivos*, it cannot create a *donatio mortis causa* because it will prevent the property from vesting in the executors (c) But in cases where delivery gives no good legal title it makes the executors trustees for the donee and they must do what is necessary to perfect the transfer (d) The reason is that the Court does not regard the title in the donee to be vested by the gift but that it so vested that he can call upon the executor to carry into effect the intention manifested by a person whom he represents Where the donors act therefore is incomplete the question arises not what the donor can be compelled to do but whether the executor cannot be compelled to complete it he being considered as a trustee for the donee so as to make the gift binding on the estate (e)

A mortgage deed it has been held can be made a subject of a *donatio mortis causa* so that the property in the deeds and the right to recover the money secured by them passed by delivery and the personal representatives are trustees for the donee and it is their duty to make the gift effectual (f)

(ii) *Gift made in contemplation of death* In order to constitute a good gift it must have been given in contemplation of death (g) where not so made the gift can not be valid (h) The evidence of the gift being made in contemplation of death must be of the clearest and the most unequivocal character The onus lies on the donee to establish this fact (i) It is not necessary that the claimant's testimony should be corroborated by further evidence (j)

The gift however, need not be made in *extremis* but if the donor dies within a few days it will be presumed to have been given in contemplation of death (k) There must be evidence of some circumstance of the immediate appearance of the death

- (a) W 484 See authorities cited
 (b) See *Cain v Moon* (1896) 2 Q B 283
 (c) *Duffeld v Elwes* 1 Bl N S 497 530
 (d) *Moore v Darlon* 4 D G & Sm 517 *Re Dillon* 44 Ch D 76 W 484 485 12 Ed
 (e) *Duffeld v Elwes* 1 Bl N S 497, *Re Dillon* 44 Ch D 76 See *Suddasook v Ram* 17 C. 620

- (f) *Duffeld v Elwes* 1 Bl N S 497
 (g) *Duffeld v Elwes* 1 Bl N S 497
 (h) *Tate v Hilbert* 2 Ves 119
Gardner v Parker 3 Madd 185
 See *Re Richards* (1921) 1 Ch 513
 (i) *Cosnahan v Gilce* 15 Moo P C 215 W 479 12 Ed
 (j) *Re Weston* (1902) 1 Cl 680
 (k) *Blount v Burrow* 4 B o C C 79 W 479 Byles Bls of Exchange 18 Ed 176-7 1 n

of the testator at the time of the gift. The mere fact that at the time the testator is in a low state but not in a dangerous way will not make a gift good even if the donor were to die shortly thereafter (a). A gift in contemplation of suicide does not constitute a valid *donatio* (b).

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 (d) *Cosnahan v Grace* 15 Moo P C 215
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 (e) *Ward v Turner* 2 Ves sen. 431
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 (n) *Powell v Hellicar* 28 L J Ch 355
 (i) *Hawkins v Blewitt* 2 Exp N P C 663 5 R R 761
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 (j) *Solicitor &c v Lewis* (1900) 2 Ch 812
 (k) *Re Weston* (1902) 1 Ch 650
 (l) *Can v Moon* (1876) 2 Q B D 283
 (m) *Drury v Smith* 1 P W 403,
Bunn v Markham 7 Taunt 231 W 481
 (n) *Powell v Hellicar* 28 L J Ch 355
Farquharson v Cane 15 L J Ch 137
 (o) *Re Wasserberg* (1915) 1 Ch 195

symbol in the name of the thing which would be insufficient but it is the way of coming at the possession or of making use of the thing (a)

The necessity of some act towards gift or transfer is insisted upon in order to avoid the dangers attached to mere nuncupative legacies (b)

If the donor resumes possession of the object, the gift is at an end (c) but possession in such connection means possession coupled with dominion *eg* delivery to the donor for safe custody does not mean parting with possession by the donee and so does not affect the validity of the gift (d)

(iv) *Gift conditional and resumable by donor* If a gift is made in expectation of death there is an implied condition that it is to be held only in the event of death (e) The title of the donee is incomplete during the life of the donor as it can be revoked at any time before death (f) The title therefore remains in the donor unless the event occurs which is to divest him (g) If the donor survive the illness the thing shall be restored to him (h) The donee then becomes a trustee for the donor in respect of the goods delivered (i) An unconditional or a present gift cannot be a *donatio* (j) A transaction therefore cannot be both a gift and a *donatio mortis causa* (k) A gift may be good as a *donatio* although it is coupled with a trust or condition But such a circumstance affords a very strong argument that the deceased did not intend to make a *donatio mortis causa* but as it were to make the defendant her executor under a nuncupative will (l)

(v) *Shall die of that illness* The gift takes effect only if the donor dies of that illness from which he did not expect to recover when he made the gift (m) In ordinary cases where death follows such a gift the Court will infer that the gift was made in contemplation of death even though the testator had made no express declaration to that effect (n) Of course where there is evidence rebutting this presumption the gift will fail as a gift made in contemplation of death (o)

- (a) *Ward v Turner* 2 Ves sen 431, 443
 (b) *Re Wasserberg* (1915) 1 Ch 195
 (c) *Ward v Turner* 2 Ves sen 431
 (d) *Re Hawkins* (1924) 2 Cl 47
 (e) *Gardner v Parker* 3 Madd 185
 (f) *Agnew v Belfast & Co.* (1896) 2 Ir R 204 *Duffield v Hicks* 1 Bl N S 497
 (g) *Edwards v Jones* 1 My & Cr 236
 (h) *Irons v Smallpiece* 2 B & Ald 551
 (i) *Staniland v Willott* 3 Mac & G

- 664 675
 (j) *Waller v Hodge* 2 Swanst 92, *Tate v Hbbert* 2 Ves 111
 (k) *Cain v Moon* (1896) 2 Q B 283
 (l) *Hills v Hills* 8 M & W 401, *Hambrooke v Simmons* 4 Russ C. C 25
 (m) *Irons v Smallpiece* 2 B & Ald 531 *Staniland v Willott* 3 M & G 664 675 W 480 12 Ed
 (n) *Gardner v Parker* 3 Madd 184
 (o) *Edwards v Jones* 1 My & Cr 236 W 479 480 12 Ed

PART VII

Protection of Property of Deceased.

Succession Protection of Property Act This Part is taken from an Act known as Succession (Protection of Property) Act XIX of 1841 except S 197 which formed S 23 of the Succession Certificate Act Act XIX of 1841 had a lengthy preamble setting forth the object of the Act, which was to meet cases of unlawful possession or disturbance of possession under pretended claims of right, and to discountenance the employment of force and fraud The decision by the Judge was not to be of such a nature as to supersede the necessity of a regular suit Lastly, the applicant was left to his ordinary remedy by suit unless he shewed that if so left, he was likely to be materially prejudiced by waste misappropriation or deprivation of possession It was thus an exceptional measure to be resorted to in exceptional cases and may be compared to S 145 Criminal Procedure Code The recitals in the preamble were followed in the provisions of the Act (a) The recital has been abolished

Applications under the Act have been condemned It has been said that Courts have been given such wide powers of making interlocutory orders that nobody will be prejudiced if a regular suit is brought and reliefs of an interlocutory nature are asked for (b) Although speedy relief is now obtainable in a regular suit yet the provisions of the Act have been retained and are embodied in the sections that follow

Where possession is not taken by a pretended claim of right or by force or fraud (see S 192) these sections do not apply There should be a finding by the Judge that the applicant should be materially prejudiced by being compelled to bring a regular suit (S 193) This Part empowers a District Judge to interfere with the ordinary rights of parties by means of a summary procedure (Ss 194 195) and so before it can be held that the Court has jurisdiction it must be found that the provisions of the law, as laid down in these sections, have been duly complied with (c) The general principle is that where jurisdiction has been given upon certain specified terms, these terms must be strictly complied with otherwise the jurisdiction does not arise (d) In a proceeding under these sections the District Judge has no jurisdiction to determine questions of title He can only deal with the right to possession An order by him to have the property of the deceased divided among two widows in equal shares, in a proceeding under these sections is bad (e)

Distinction between Succession (Protection of Property) Act and Succession Certificate Act It has been thus stated In the one case there was a party in possession who was not to be disturbed unless his possession was manifestly wrongful In the other case, there was no consideration arising out of possession and the Court with several claimants before it, all standing upon

(a) *Jusoda v Gouree* 6 W R Mis 53 55, see *Mahmadbhai v Bai Havabai* 26 Bom L R 145, 80 I C 269 The preamble gave rise to difficulties of construction, *Gopi v Raj Krishna* 12 C L J 8, *Phul Chand v Kishmsh* 11 C L J 521, 6 I C 630
(b) *Jusoda v Gouree*, 6 W. R. Mis 53,

56, *Mahmadbhai v Bai Havabai*, 26 Bom L R 145, 80 I C 269
(c) *Sato Koer v Gopal* 34 C 929
(d) *Nussermanjee v Meer Mynodeen*, 6 M I A 134, 155
(e) *Bhugwandeon v Myna Baee* 11 M I A 487, 9 W R P C 23 32.

equal ground had to determine the right to the certificate and to grant the same accordingly (a)

Part V (now Part VII) deals with protection of the property of the deceased. It is largely based on the Succession (Property Protection) Act, 1841 (XIX of 1841). This Act was framed under the old system of drafting and certain slight verbal changes of language have necessarily been made in introducing its provisions in the consolidated Bill but reference will be made under the appropriate clauses to all changes which are other than purely verbal —Notes on Clauses of the Original Bill

The amendments made are purely drafting amendments —Joint Committee Report. Amendments of a verbal nature have been made in the language of all the sections. The change in connection with S 193 has been noted as that is of a more material nature.

192 (P P A 1) (1) If any person dies leaving property, moveable or immoveable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

Person claiming right by succession to property of deceased may apply for relief against wrongful possession

(P.P.A. 2) (2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

1 The section A court has jurisdiction to entertain an application under this section only where the conditions set out in this section and in the next exist. Therefore where a party in a very high handed manner took forcible possession of a furniture shop and there was every likelihood of his proceeding to great lengths unless sharply checked *held* the District Judge was right in taking action under this Act (b)

2 Succession The object of the Act as has been stated above is the protection of property of a deceased person. When such property has been taken or there is apprehension of being taken by another person the Court is justified in interfering only in the interest of a person claiming by right of succession. Therefore on the death of the member of a Hindu family governed by Mitakshara law as the other members take by survivorship and not by inheritance these sections have no application (c). An application however lies by a person who claims a share only in the estate left by the deceased alleging that his share has been seized by other persons in assertion of a pretended claim of right by gift or succession (d)

(a) *Jusoda v Gourtee* 6 W. R. M. 53
Tarak v Salya 15 I. C. 504
Sala Koer v Gopal 34 C. 929

Abdulla v Mitthur 23 M. L. J. 537
 (d) *Gopi v Raj Krishna* 12 C. L. J. 8

The word 'succession' is not confined to intestate succession and applies also to testamentary succession. It is not necessary that succession should be claimed from the last deceased proprietor. It is competent for a shiebt to present an application under the Act (a).

3 District Judge. Only the District Judge is empowered to entertain an application under this section. Whether the expression includes a Subordinate Judge (b) or the Recorder of Rangoon (c), see the cases cited below.

4 Seizure. An application under this section lies when the possession to property movable or immovable is disturbed by a person with apparently no lawful title (d). The bonafides of the applicant must be *prima facie* clear (e). It is generally when disputes break out on the death of a person and forcible seizure or threat of seizure of property by some one or other of the parties to the dispute is made, that an application lies under this section by the person entitled who is or is threatened to be ousted from possession (f). An application may be made by the Collector as agent of the Court of Wards for the appointment of a curator (g).

193. (P.P.A. 3) The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit and that the application is made *bona fide*.

1. Chango S 3 of the old Act ran as follows.

And it is hereby enacted, that the Judge to whom such application shall be made shall, in the first place enquire by the solemn declaration of the complainant, and by witnesses and documents at his discretion, whether there be strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bonafide*.

2. The section. There has thus been a material alteration in the wording of this section. In the corresponding section 3 of the old Act it was provided that the Judge "shall enquire by the solemn declaration of the complainant,"

(a) *Benode v Rat Sundari*, 30 C W N 500

(b) *Ganga v Babulal*, 46 I C 589

(c) *Goof v Fatima*, 24 C 30, See *Re Fackerooddeen*, 11 W R 413

(d) *Jussoda v Gourree* 6 W R. M 53, 56, see Preamble (abolished) old Act, see note ante

(e) See above case, *Phul Chand v.*

Kishmish, 11 C L J 521, 6 I C 630

(f) *Gopi Krishna v Raj Krishna*, 12 C. L. J 8; *Ganga v Babu Lal*, 46 I. C 589, *Krishnasami v Nuthu Krishna*, 24 M 364

(g) *Papamma v Collector &c*, 12 M 341

which was construed to mean that he could act on the statements contained in the affidavit of the applicant (a) That provision has been omitted in the present section so that the Judge is bound to "examine the applicant on oath" Under the old Act the holding of a preliminary enquiry was compulsory (b) but it is no longer so in view of the words used in this section The inquiry was insisted upon in order that the Judge might be satisfied, first, that the opposite party had no title, and secondly, that the applicant was entitled and was likely to be materially prejudiced if left to the remedy of a regular suit, and that the application was *bona fide* (c) These are conditions precedent to the application of the section The judge must examine the applicant and hold the enquiry, if he thinks necessary, prior to the citation of the party complained of as mentioned in the next section An omission to examine the applicant is a material irregularity (d) The word 'shall' in the section is mandatory (e) Although the holding of an enquiry is no longer imperative, the Judge must be satisfied on the evidence of the applicant on the points mentioned above If the evidence be not satisfactory he may order an enquiry if he thinks it necessary in the interest of justice When such an application is presented, in the ordinary nature of things, it is desirable after a summary enquiry to pass an order as to who is to remain in possession or as to a curator being appointed (f)

3 Examination of applicant The applicant and his witnesses should be examined in support of his case A refusal of permission by the Judge is a material irregularity and the High Court can interfere in such a case He cannot act merely on the report of the Collector (g) Therefore where the Judge did not go into evidence but relegated the parties to a regular suit (h), or where on the application of the District Collector, as agent of the Court of Wards, for the appointment of curator the Judge on the same day made an order (i), or where he acted simply on the report of the Collector (j), or where the party complained of failed to produce the remaining witnesses on the day fixed for their production and the Judge accordingly made the order (k), *held*, he had in each case acted with material irregularity A District Judge has to be satisfied that the opposite party has "no lawful title." Merely hearing a pleader in support of the claim is not enough (l) The requirements of this section cannot be dispensed with where S 199 applies (m)

- (a) *Gopi Krishna v Raj Krishna* 12 C. L. J. 8, *Ghurku v Durga* 10 I C. 820
 (b) *Jusoda v Gouree*, 6 W. R. Mis 53
 (c) *Phul Chand v Kishmish*, 11 C. L. J. 521, 6 I C 630
 (d) *Phul Chand v Kishmish* 6 I C 630, *Papamma v Collector &c*, 12 M 341, *Kothandarama v Jagathambal*, 71 I C 32
 (e) *Abdulla v Mithur*, 23 M. L. J. 537, 17 I C 429, *Ganga Sahai v Babu Lal*, 46 I C 589, *Krishnasami v. Muthu Krishna*, 24 M 364, 369

- (f) *Sakharam v Vinayak*, 102 I C 622
 (g) *Sala Koer v Gopal Sahu*, 34 C 929
 (h) *Abdul v Kullit* 10 M 69
 (i) *Papamma v Collector &c* 12 M 341
 (j) *Krishnasami v Muthu Krishna* 24 M 364
 (k) *Ganga Sahai v Babu Lal* 46 I C 589
 (l) *Phulchand v Kishmish*, 11 C. L. J. 521, 6 I C 630
 (m) *Krishnasami v Muthu Krishna* 24 M 364, 369 (*Subrahmanya Ayyar J. dissenting*)

4. Jurisdiction. It has been observed before that compliance with the provisions of this section and the next are essential (a) The Court has no jurisdiction to act in disregard of these two sections (b). Before the Judge assumes jurisdiction it must be found that the provisions of law have been strictly complied with (c) A slight case would not be sufficient The Judge must be satisfied on all the points mentioned in the section before he can properly exercise his jurisdiction (d).

194. (P.P. A. 4.) If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly :

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

1. Satisfied The District Judge has got to be satisfied that the conditions laid down in S 193 exist before he begins to proceed under this section and issues notice upon the party against whom the complaint is made. The application ought not to be granted as a matter of course (e) A slight case would not be sufficient. The title and bona fides of the applicant must *prima facie* be clear. It must also appear that the party complained of had no lawful title to possession and that if the applicant were referred to a regular suit he would be a serious sufferer, as by risk of waste or misappropriation or by his inability to prosecute his right when out of possession (f). The District Judge is entitled to take into consideration the delay which occurs in presenting or bringing on an application (g)

2. Determine summarily The decision of the Judge is not adjudication on the question of title but of a summary character determining the right to possession only It is final so far as it goes and not subject to any appeal or review (S 209). It does not debar the parties from bringing a regular suit (S 208).

(a) *Krishnasami v. Muthukrishna*, 24 M 304

(b) *Kathandarama v. Jagathambal*, 71 I C. 32. See *Jagoji v. Manmohan*, 7 P. R. 1904.

(c) *Sato Koer v. Gopal Sahu*, 34 C. 929, 12 C W N 65 See *Nusserwanji v. Meer Mynooddeen*, 6 M 1 A 134, 155

(d) *Jusoda v. Gouree*, 6 W. R. M 53, 56

(e) *Gopi v. Raj Krishna*, 12 C L J 8; *Krishnasami v. Muthukrishna*, 24 M 364

(f) *Jusoda v. Gouree* 6 W. R. M 53, 56

(g) *Sakharam v. Vinayak*, 102 I C. 622.

3. **Summon the party.** This follows from the elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice a party cannot be made unless he had been afforded an opportunity to be heard. The High Court can interfere on breach of this rule (a).

4. **Inventory.** The power to order an inventory is one of a still more summary character than that of determining possession, because the order can be made before the Judge has finished his enquiry, provided he is satisfied that his intervention is necessary for the protection of the alleged interests of the applicant. As the inquiry takes place after the examination of the applicant on oath, it is clear the order for inventory cannot be made before such examination. Where it is so done the order is made without jurisdiction and can be set aside under S 115 C. P. C. (b). From the word 'concluded' it appears that the Judge may direct an inventory to be taken, if it appears necessary in the course of enquiry though the enquiry has not been concluded. In other words, the inventory cannot be directed to be made before the enquiry has begun though it may be directed before the enquiry is finished (c).

195. (P. P. A. 5.) If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof:

Provided that, in the case of land, the Judge may delegate to the Collector, or to any officer subordinate to the Collector, the powers of a curator:

Provided, further, that every appointment of a curator in respect of any property shall be duly published.

The section. The section is not affected by S 199, so the Judge is not entitled to proceed upon the Collector's report only and dispense with the requirements of the preceding sections of this Part (d). The main relief sought by an applicant under S 192 is delivery of possession, where he has been

- (a) *Satyendra v Narendra* 39 C. L. J 279, *Rajendra v Atal*, 25 C. L. J 456
(b) *Abdul v Kutti*, 10 M 68
 Abdulla v Mirthur, 23 M. L. J

- 537, 17 I. C. 429
(d) *Krishnasami v Muthukrishna* 24 M 364, 368 (Subrahmanya Ayyar J dissenting)

actually ousted, and protection when forcible means of seizing possession are apprehended. There are two other ancillary reliefs he is entitled to, viz., to have the effects of the deceased secured by an inventory or otherwise made by an officer appointed by the Court and to have a curator or curators appointed with more or less the same end in view. Of course the grant of one relief is no bar to the grant of the other.

When curator may be appointed. The conditions subject to which a curator is to be appointed are (i) there must be an application and examination under Ss 192 and 193 (ii) the Judge must be in a position to say upon such application and examination that danger is to be apprehended of misappropriation or waste of the property before the summary suit can be determined, and (iii) delay in obtaining security from the party in possession or its insufficiency is likely to expose the party out of possession to considerable risk (iv) the Judge must be satisfied that the applicant is the lawful owner and should state in the order that he is satisfied as regards these requisites (a).

Failure to observe the conditions which limit the power of the Court to appoint a curator amounts to material irregularity under S 115 O P Code (b). Where there was no clear finding that the danger of misappropriation was really apprehended and the District Judge did not demand security from the party in possession the order was set aside (c).

Curator and receiver. The position of a curator is analogous to that of a receiver. None is in any sense a representative of the deceased. Each is merely entrusted by the Court with certain powers over the estate for a temporary purpose (d).

196 (P P A 6). The District Judge may authorise the Powers conferable on curator curator to take possession of the property either generally or until security is given by the party in possession, or until inventories of the property have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession.

Provided that it shall be in the discretion of the Judge to allow the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds or other effects.

Term of office. The curator, where no time is fixed for the duration of his appointment continues to be in possession of the property till the determination of the summary proceeding and the delivery of possession in consequence

(a) *Pitam Lal v Kalla Ram* 29 A L J 711 F B, see *Mahmadbhai v Bai Harabai* 80 I C 269.
(b) *Papamma v Collector &c* 12 M. 341, *Krishnasami v Muthukrishna* 34 M 364. *Madan Gopal v Narbada* 28 I C 248.

(c) *Madan Gopal v Narbada* 28 I C 248, see *Sakharam v Vinayak* 102 I C 622.
(d) *Harihar v Harendra* 37 C 754. *Babesab v Narsappa* 20 B 437. See S 200.

But the Court can limit the duration of his authority, (i) until security is given by the party in possession, (ii) until inventories of the property have been made, or (iii) until such other time as may appear to the Court sufficient to secure the property from waste

Proviso It will appear from the preceding section that a curator is appointed in order to minimise the loss or damage that might accrue to the party out of possession consequent on the delay in obtaining security from the party in possession or the insufficiency thereof. This section declares that security is not to be demanded from the party in possession as a matter of course but the matter rests in the discretion of the Court as also the matter whether this party will be allowed to continue in such possession or not. But the discretion even if exercised in favour of the continuance in possession, will not in any way affect or limit the Judges power touching inventories or the securing of deeds or other effects

197. (S C. 23) (1) Where a certificate has been granted under Part X or under the Succession Certificate Act, 1889, or a grant of probate or letters of administration has been made, a curator appointed under this Part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

Prohibition of exercise of certain powers by curators

(2) All persons who have paid debts or rents to a curator authorised by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be

Payment of debts etc to curator

The section The section shows that the existence of an executor or administrator or certificate holder is no bar to the appointment of a curator, but in order that their powers may not come into conflict it is provided that in such a case the curator shall not exercise any authority lawfully belonging to any of the former persons

Subsection (2) further provides that payment to a curator authorised by the Court to receive it is a good discharge of the debt or rent so far as the debtor or tenant is concerned. The executor, administrator or certificate holder is to recover the amount from the curator and the debtor or tenant is not liable to make good the amount to the estate in case default is made by the curator

198 (P. P. A 7) (1) The District Judge shall take from the curator security for the faithful discharge of his trust, and for rendering satisfactory accounts of the same as hereinafter provided, and may authorise him to receive out of the property such remuneration, in no case

Curator to give security and may receive remuneration

exceeding five per centum on the moveable property and on the annual profits of the immoveable property, as the District Judge thinks reasonable

(2) All surplus money realized by the curator shall be paid into Court, and invested in public securities for the benefit of the persons entitled thereto upon adjudication of the summary proceeding

(3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be taken generally to answer all cases for which the person may be afterwards appointed curator, but no delay in the taking of security shall prevent the Judge from immediately investing the curator with the powers of his office

199 (P. P A. 8) (1) Where the estate of the deceased person consists wholly or in part of land paying revenue to Government, in all matters regarding the propriety of summoning the party in possession, of appointing a curator, or of nominating individuals to that appointment, the District Judge shall demand a report from the Collector, and the Collector shall thereupon furnish the same

Report from Collector where estate includes revenue paying land

Provided that in cases of urgency the Judge may proceed, in the first instance, without such report

(2) The Judge shall not be obliged to act in conformity with any such report, but, in case of his acting otherwise than according to such report, he shall immediately forward a statement of his reasons to the High Court, and the High Court if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector

The section The section may have served some useful purpose when first introduced but it strikes as being wholly out of place at the present day. Sub-section (2) seems to exhibit a bias in favour the executive in the mind of the framers of the Act

The section though it requires a Judge to call upon a Collector to submit a report has not authorised the former to dispense with the requirements of S 193. If the Judge therefore pursuant to the Collector's report were to appoint a curator to take possession without holding an inquiry the proceeding would be vitiated by irregularity and would be liable to be set aside on revision by the High Court (a)

200 (P. P. A. 9.) The Curator shall be subject to all Institution and orders of the District Judge regarding the defence of suits. institution or the defence of suits, and all suits may be instituted or defended in the name of the curator on behalf of the estate ;

Provided that an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents ; but such express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof.

Suit by curator. Is a succession certificate necessary for a curator before institution of a suit? *Babasab v. Narsappa (a)* is authority for the proposition that it is not necessary, for a curator is not a representative of the deceased person, but in *Harihar v. Harendra (b)* it has been pointed out that it is necessary, at any rate, in certain cases.

201. (P. P. A. 10.) Pending the custody of the property by the curator, the District Judge may make such allowances to parties having a *prima facie* right thereto as upon a summary investigation of the rights and circumstances of the parties interested he considers necessary, and may, at his discretion, take security for the re-payment thereof with interest, in the event of the party being found, upon the adjudication of the summary proceeding, not to be entitled thereto.

202. (P. P. A. 11.) The curator shall file monthly Accounts to be accounts in abstract, and shall, on the expiry filed by curator. of each period of three months, if his administration lasts so long, and, upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge.

203. (P. P. A. 12) (1) The accounts of the curator shall be open to the inspection of all parties interested ; and it shall be competent for any such interested party to appoint a separate person to keep a duplicate account of all receipts and payments by the curator.

(2) If it is found that the accounts of the curator are in arrear, or that they are erroneous or incomplete, or if the

curator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default

204. (P. P. A. 13). If the Judge of any district has appointed a curator, in respect of the whole of the property of a deceased person, such appointment shall preclude the Judge of any other district within the same province from appointing any other curator, but the appointment of a curator in respect of a portion of the property of the deceased shall not preclude the appointment within the same province of another curator in respect of the residue or any portion thereof:

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this Part before another Judge :

Provided, further, that if two or more curators are appointed by different Judges for several parts of an estate, the High Court may make such order as it thinks fit for the appointment of one curator of the whole property

205. (P. P. A. 14) An application under this Part to the District Judge must be made within six months of the death of the proprietor whose property is claimed by right in succession.

Proprietor. Proprietor does not mean full or absolute owner of property. So where an application was made within six months of the death of a Hindu widow who had succeeded to her husband's property, *held*, the application was within time (a)

206. (P. P. A. 15). Nothing in this Part shall be deemed to authorise the contravention of any public act of settlement or of any legal directions given by a deceased proprietor of any property for the possession of his property after his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto.

(a) *Dhilmappa v Khanappa*, 34 B 115, fold in *Benode v. Ral Sundari*,

30 C W. N 500 (an idol is entitled to apply).

The section. According to this section where there is any public act of settlement or any legal directions given by a deceased proprietor in respect of any property, the Judge, on such settlement or directions being established by evidence, should order possession to be made over to the party entitled and not place the property under the charge of a curator. The Judge is not to put this Part of the Act in force so as to contravene any settlement or direction of the deceased proprietor but should give effect to it. It has however been observed that the section provides a rule for the guidance of the Judge in dealing with the summary suit on the merits rather than to interdict the exercise of jurisdiction under the Act (a).

207. (P. P. A. 16) Nothing in this Part shall be deemed to authorise any disturbance of the possession of a Court of Wards of any property; and in case a minor, or other disqualified person whose property is subject to the Court of Wards, is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid; and if the minor or other disqualified person, upon the adjudication of the summary proceeding, appears to be entitled to the property, possession shall be delivered to the Court of Wards.

208 (P. P. A. 17) Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this Part.

209. (P. P. A. 18). The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review.

The section. The decision of the District Judge in a summary proceeding under this part can be set aside by a regular suit (b). No appeal lies from his decision, his order being final (c)

(a) *Papamma v. Collector &c.* 12 M 341, 346

(c) *Mohan Lall v. Ulfunnissa*, 11 W

R 93, 5 B L. R 164
(c) *Gajadhar v. Megha* 44 A 546

Revision The High Court can exercise the powers of revision under S 115 of the Civil Procedure Code Where the District Judge has not complied with the provisions of S 193, it has been held he has acted without jurisdiction An order passed under such circumstances is vitiated by material irregularity and can be set aside by the High Court (a) The High Court will not interfere in revision unless it is satisfied that the person moving it has no other remedy open to him whereby he may obtain the relief sought Therefore where a suit has already been filed, the application for revision of the order of the District Judge will be refused (b).

210. (P. P. A. 19.) The local Government may appoint public curators for any district or number of districts; and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of a curator is left discretionary with him under this Part.

(a) *Papamma v Collector &c.*, 12 M 341, *Phul Chand v Kishmsh* 11 C. L. J 521, 6 I C 630 *Tarak v Satya* 15 I C 504, *Kothandarama v Jagathambal* 71 I C 32, *Rajji v Lalchand*, 133 P R 1906 p 505, *Krishnasami v Muthukrishna* 24 M 364 *Abdul v Kuffi*, 10 M. 68, *Bhimappa v Khanappa*,

34 B 115, *Sato Koer v. Gopal* 34 C 929 In *Gaurishankar v Debi Prasad* 120 I C. 401, the opinion has been expressed that this section is a bar to the exercise of revisional powers by the High Court. (b) *Ganga Sahai v Babu Lal* 46 I C 589, See *Sakharam v Vinayak*, 102 I C. 622

PART VIII.

Representative Title to Property of deceased on succession.

'This is an important portion of the Bill which deals with title to the property of the deceased. It is only by separating these provisions of the law that a clear view can be obtained of the requirements of the Indian law as to grants by Court in the case of the estate of a deceased person. By separating the law in this manner, the consolidation of these provisions of the law relating to probate and grant of administration which are now contained in the Indian Succession Act, 1865 (X of 1865) and the Probate and Administration Act 1881 (V of 1881), is rendered possible'—*Notes on Clauses*

211. (S. 179. P. 4) (1). The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

Character and property of executor or administrator as such

(2) (P. 4) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

1. The section. The object of this as also of the following sections is to provide a representative competent to deal with property on the death of the owner. The law does not like property to remain without a representative in law. This section applies to Parises (a) Before a person can be granted probate or letters of administration he must show that he is the executor or that the property has vested in him (b)

2 Executors and administrators. The section places an executor or administrator on the same footing so far as representation of the deceased and the vesting of his estate are concerned (c) But from this it is not to be concluded that the position of these two legal representatives is identical for all purposes. The chief points of difference may be thus noted —

(1) The interest of an executor in the estate of the deceased vests in him from the moment of the testator's death (S 211), that of an administrator from the time of the grant (S 227) (2) An executor may do many acts before he has obtained probate (S 227), an administrator may do nothing till letters of administration are granted to him (Ss (220, 221) (3) An executor derives his powers from the will and not from the probate (Ss 220, 227) but an administrator owes his powers entirely to his appointment by Court (d) (4) An executor is not required to execute

(a) *Jehangir v Bai Kulkarni* 27 B 281
(b) *Ambadas v Kashibai* 71 I C 979
(c) *Kurratulain v Abbas Hussain* 33 C. 116 P C 9 C. W. N 938.

(d) *Ambika v Kala* 10 C. W. N 422
W 272 12 Ed *Chetty v Chetty*
1916 A C. 603, 43 I A 113

a bond (except where the Court otherwise directs) for the discharge of his duties, but an administrator is bound to execute such a bond (a) (S 291) Apart from the question of the bond, the differences are, it will be observed, confined to the origin of the powers and their exercise before the grant of letters of administration After the administration is granted, the interest of the administrator in the property of the deceased is equal to and is the same with the interest of an executor Executors and administrators differ in little else than in the manner of their constitution (b)

3 Legal representative An executor or administrator is called the legal representatives because he is the representative in law of the estate of the deceased (c) and by virtue of such position all the property of the deceased vest in him (d) If any Receiver has been appointed of the estate, he should be discharged after the grant (e) The expression is susceptible of more than one meaning and accordingly its use in wills in connection with the gifts of legacies has been condemned (f) *Prima facie*, it means the executor or administrator (g) Under S 83 of the Trusts Act (II of 1882) the expression includes heirs who represent the interest of the deceased ancestor by inheritance (h) An executor or administrator has also been called a personal representative, because before the Land Transfer Act of 1897 (60 & 61 Vict C 65) the personal property of the deceased went to him in the first instance, under English law The expression is not free from ambiguity, because it has been held to mean the next of kin (i) The term representative simply refers also to an executor or administrator (j) As there is no difference in the modes of devolution of real and personal estates in this country such as prevailed in England when the Succession Act was passed (k), the expression legal representatives' has been adopted in this Act The expression was defined for the first time in the Civil Procedure Code (S 2) (11) There was some uncertainty about its meaning before the definition was introduced in that Code (l) The decree obtained and execution had against one executor or administrator is binding on his successor in the absence of fraud or collusion (m)

4. Legal representative for all purposes 'To appoint an executor is to place one in the stead of the testator, who may enter into the testator's goods and chattels, and who hath action against the testator's debtors and who may dispose the same goods and chattels towards the payment of the testator's debts,

- (a) M 576
- (b) W 423 12 Ed *Blackborough v Davis*, 1 P W 41 Shep Touch 474
- (c) *Chatha Kelan v Govinda* 17 M 186
- (d) *Bal Meherbal v Maganchand* 29 B 96 6 Bom L R 853 After the grant they fully represent the deceased *Ambica v Kala*, 10 C W N 422, 424, *Mohananda v Akhoy* 6 C W N 488, *Taran Ramrajan* 31 C. 89, 92, *Kaloo v Bibi Ramzo* 60 I C. 350
- (e) *Baidyanath v Rajendra* 52 C. L. J. 66, 129 I C. 879
- (f) *Topping v Howard* 4 D G & S

- 268, *Smith v Barneby*, 2 Coll 728
- (g) *Holloway v Clarkson* 2 Hare 521
- (h) *Dwarkanadas v Dwarkanadas*, 40 B 341, 348, See *Assamathemnessa v Roy Lutchmeeput*, 4 C 142
- (i) *Baines v Otley* 1 My & K 465, *King v Cleaveland* 26 Beav 26
- (j) *Re Horner* 37 Ch D 695, *Re Ware*, 45 Cha D 269 J 1535 sq 7 Ed
- (k) See *Mancharji v Narayan*, 1 B H C. R 77/ 83
- (l) *Dinamoni v Elahadut* 8 C. W N 843, see *Sachindra v Beplin*, 35 C. W. N 1023
- (m) *Bal Meherbal v Magan Chand* 29 B. 96

and the performance of the will (a), One effect of an executor or administrator representing the estate is that persons beneficially interested in the property of the deceased are not ordinarily necessary parties in a suit regarding the property (b) the executor or administrator being the statutory owner of the property of the deceased (c). After the grant of administration the powers of the administrator are the same as those of the executor who has obtained probate. They both however hold by a representative title (d) and occupy a fiduciary position in respect of the assets that come to their hands (e). Thus even in the case of a gift to the legal representative of A the hand to receive the money is that of the person constituted representative but that person will in the absence of a clear intention to the contrary, take the property as part of the estate of A whose representative he is and not beneficially (f). In the capacity of the representative of the deceased the executor is bound to carry out the deceased's directions relative to the disposal of the property and whenever such directions are absent or are invalid he is to hand over the property to those entitled by law to succeed to it who are immediately entitled beneficially to their respective shares in such property notwithstanding the pendency of the executor's estate or right of representative ownership (g). The executor holds the properties in the right of the testator and not in the right of the beneficiaries. If therefore an executor does not sue in time but allows a claim to be barred, the beneficiary is also barred. A title gained against an executor is good as against the beneficiary (h).

5 All the property The expression means that it is only the actual property of the deceased whether held by him for own benefit or the benefit of others and not the property vested in him as executor or administrator that passes to his legal representatives (i). The executor or administrator takes both movable and immovable properties (j). The grant of probate does not confer any title upon the executor to property which the testator had no right to dispose of. It only perfects the representative title of the executor to the property which did belong to the testator and over which he had a disposing power (k). Whether the property falls into possession at the time of the testator's death or many years afterwards (l). S 2 read with this section shows that a probate granted by the Court gives the executor a right of administration to all the property of the testator which vests in him wherever situate (m) (see S 273 which says that probate has effect over property throughout the province or British India as the case may be). Under this

- (a) *Swinn pt IV S 2 cited in W 131 Bownrigg v Pke 7 P D 61*
See S 309 sq
(b) *Mohananda v Akhoy 6 C W N 488* (Brother of the deceased is not a necessary party and has no right to succeed)
(c) *Motilal v Jamsetjee 29 C W N 45 80 I C 777 P C*
(d) *Rajnarain v Universal Ec 7 C 594*
(e) *Prayag v Siva Prasad 93 I C 335*
(f) *Halloway v Clarkson 2 Hare 521 J 1595*
(g) *Brjanath v Anandamay 8 B L.*

- R 208 221*
(h) *Kesho Prasad v Madho Prasad 3 Pat 880 83 I C 812*
(i) *De Souza v S S for India, 12 B L R 423 428* (old in *Midnapur Zamindari Co Ltd v Ram Kanai 5 Pat 80, 91 I C 169*)
(j) *Mancharji v Narayan 1 B H C R 77 83*
(k) *Behary v Juggo Mohun 4 C 1 5*
Rajnarain v Universal Ec 7 C 594
(l) *Dwarkanadas v Dwarkanadas 40 B 341 345*
(m) *Re Ezekiel 21 B 139 142.*

section all the property of the deceased vests in the executor except what passes by survivorship and the Court has no authority to grant probate limited to a part of the estate (a) The executor is *prima facie* the only person entitled to claim performance of contracts made with the testator (b)

6 Vests. 'The proper legal meaning of the words vested is vested in point of interest' (c) But its natural and etymological meaning is said to be 'vested in possession' (d) Here of course the word means vested in interest and that is the ordinary meaning of the word (e) The interest of the executor in the estate vests in him from the moment of the testator's death (f) After administration has been complete and the terms of the will have been carried out the property ceases to be the estate of the deceased and becomes the property of the residuary legatee under the will, and the executor as such has no authority to manage the estate on his behalf (g), but holds it as trustee for the beneficiary (h) An administrator derives his interest from the grant (S 212) (i) though under S 220 it relates back for certain purposes to the time of the testator's death. After the estate has once vested in the executor (or administrator) he is the only person who can sue a debtor a legatee can not sue as he does not represent the estate (j) Although on the death of a testator property vests in the executor, it also vests in the legatee (unless the legacy is contingent) and is liable to attachment by the legatee's creditors (k) The statutory vesting under this section takes effect in substitution for the vesting in the heirs which exists between the death of the deceased and the grant of the letters (l) In cases of wills to which the Hindu Wills Act did not apply the estate of the testator vested in the executor (who accepted office) from the date of the testator's death and the provisions of the Probate and Administration Act (XXI of 1870) were applicable even though probate had not been obtained (m)

(i) *Position before the Hindu Wills Act* The word vest, it has been pointed out, is not an appropriate one to describe the position of a Hindu executor in a will made prior to the Hindu Wills Act as he took no estate but only a power of management (n) He has therefore a limited and qualified power (o) His

(a) *Bodi v Venkataswami* 38 M 369

(b) *Ramlal v Dattu* 55, 1 C 418

(c) *Richardson v Power* 19 C B N S 780, *Creech v Wilson* 9 L R Ir 216

(d) *Young v Robertson* 4 Macq 314

(e) *Re Arnold's Estate* 33 Beav 163, *Parkin v Hodgkinson*, 15 Sim 293 1 21823

(f) *Jehangir v Bai Kulkarni* 27 B 281, *Antony v Makis* 34 M 395

(g) *Taran v Ramratan* 31 C 89, 93 see *Sankar v Biddulata* 28 C L J 271, 48 1 C 295

(h) *Kesho Prasad v Aladho*, 3 Pat 880, 83 1 C 812,

(i) *Ambica v Kala*, 10 C W N 422, 424

(j) *Chanduru v Neralla* 33 M L J 195

(k) *Adusupalli v Pillai* 22 M L J 228

(l) *Laxmidas v Ismail* 28 Bom L R 1262, 99 1 C 482

(m) *Kalreddi v Kadigala* 49 M 261, 290 F B But see *Kherodmoney v Doorgamoney* 4 C 455 468 cited below

(n) *Kherodmoney v Doorgamoney* 4 C 455, 468 *Sharo Bibi v Baldeo* 1 B L R O C J 24, *Sarat v Bhupendra* 25 C 103 fold in *Amulya v Kalidas* 32 C 861, 1 C L J 270

(o) *Lallubhai v Mankucarnal* 2 B 388, *Grish v Broughton* 14 C 861, 875, *Sakina v Mahomed* 37 C 839, *Taylor v Rajah of Parlakti* medi 32 M 443, 455, *Kherodmoney v Doorgamoney* 4 C 455 *Maniklal v Manchani*, 1 B 269 275, *Sakina v Mahomed* 37 C 839 see *Grish v Broughton*, 14 C. 861

position has been described as similar to that of a shebait of an idol (a) His powers and functions are not those of an English executor but rather those of a manager He did not require probate, and probate if obtained would not have vested in him with any title to the estate which he administered An executor having no estate himself cannot transfer it to the Administrator General (b) The property went to the heir (c) The position of an executor of the will of a Muhammadan is the same (d)

(ii) *Where the Hindu Wills Act had no operation* Whatever powers the executors had were conferred on them by the will and it was their duty to exercise those powers in conformity with the provisions of the will (e) Grant of probate or of letters of administration took effect only for the purpose of recovering debts and securing debtors paying the same (f) Therefore where the Hindu Wills Act had no operation the Courts regarded an executor under the will of a Hindu as possessing power inferior to that of an executor in England or under the Succession Act (g)

(iii) *Position since the passing of the Hindu Wills Act* Where the Act applies its effect has been to place a Hindu executor who was in a position and chose to take advantage of its provisions on precisely the same footing as the executor of an Anglo Indian testator in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased (h) Executors appointed by the particular class of Hindu wills contemplated by the Hindu Wills Act thus acquired the same estate and interest in the property of the deceased together with the same restrictions as to representing the estate in a Court of Justice as obtained by English law (i) The effect of this section it has been pointed out is to put the law in India on the same footing as in England (j) The rights and functions of an executor the limitation of the effect of the probate within a particular area the necessity of foreign probate of grant or administration for recovering assets situate within a foreign jurisdiction the comity which would generally lead the foreign Court to follow the grant of the Court of domicile—all this is for the most part the same (here) as in England (k)

The Probate Court confers a legal character on the administrator by grant of administration The effect of probate is to declare the executor to have a legal character (l) Since the passing of the Hindu Wills Act the property

- (a) *Bal Meherbai v Magan Chand* 29 B 96
 (b) *Adm Genl v Premlal* 22 I A 107 114 22 C 788 795, *Kalreddi v Kadyala* 49 M 261 277
 (c) *Tooleydas v Premji* 13 B 61
 (d) *Sakina Bibee v Mahomed* 37 C 839 15 C W N 185
 (e) *Purushottam v Kala* 26 B 301
Jaykali v Shibnath 2 B L R O C 11
Maniklal v Manchershil 1 B (275), *Sakina v Mahomed* 37 C 839 15 C W N 185
Re Haji Gsmall 6 B 452 459

- reld to in *Shahk Moosa v Shahk Essa* 8 B 241 252 *Sakina Bibee v Mahomed* 37 C 839
 (g) *Lallubhai v Mankuvarbai* 2 B 388 407 see *Greender v Makintosh* 4 C 897
 (h) *Adm Genl v Premlal* 22 C 788 796
 (i) *Shahk Moosa v Shahk Essa* 8 B 241 253
 (j) *Jehangir v Bal Kukilal* 27 B 281
 (k) *Re Ezekiel* 21 B 139 149
 (l) *Grish v Broughton* 14 C 861, 875

of the deceased testator vests in his executor, the latter is bound to carry out the directions of the deceased relative to the disposal of the property and he cannot exclude those to whom the testator or to whom the law directs that the property should go from the deceased. The legal representative becomes immediately entitled to property not validly disposed of or not dealt with by the deceased (a).

7. Executor and Probate. An executor named in a will represents the estate of the deceased for all purposes even before probate of the will has been taken out for he derives his title from the will and not from probate. Probate is only evidence of the executor's appointment and the executor represents the estate from the time of the testator's death (b). As the legal representative of the deceased for all purposes the executor can act, *eg.*, can give a valid discharge to a debtor, before he has taken out probate. In fact he is placed in the same position in this respect as an English executor (c). Whether he can enter into compromise with the co-executor has been stated to be not free from doubt (d). It is not right to treat a will of which probate has not been granted as non-existent and the property passing by intestacy. The executor under a will can deal with the property and give a perfectly good title though it may be that to complete that title it is necessary to take out probate at a later date (e). In England the executor, before he proves the will may do almost all the acts which are incident to his office, except only those which relate to suits (f). Probate is made operative as the authenticated evidence, and not at all as the foundation of the executor's title for he derives all interests from the will itself and the property of the deceased vests in him from the moment of the testator's death (g). But if a widow be appointed as executor and be given power to adopt she loses all her powers as executor on adoption (h).

The estate of a testator did not vest in his executor under a Hindu will made before the Hindu Wills Act came into force unless the executor took out probate (i). But in respect of wills made after the passing of the Act the property of the testator, under this section, vests in the executor. It vests in all the executors and not only in those who have proved the will or acted in the administration of the estate. It is settled law that it is not incumbent on a Hindu executor to obtain probate before acting, although there is nothing to prevent him from taking out probate (j).

- (a) *Brajanath v Anandamaji* 8 B L R O C J 208 221
 (b) *Meghraj v Krishna* 46 A 286 22 A L J 193 *Lakhya v Umakanth* 14 C W N 256 2 I C 818 not fold
 (c) *Shah Ali v Shah Essa* 8 B 241, 255
 (d) *Chidambara v Krishnasami* 39 M 365
 (e) *Parthasarathy v Subbaraya* 72 I C 559, unprobated will put forward in Court *Gunfa v Gunfa* 87 I C

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 (f) *Narrondas v Narrondas* 31 B 418 428 *Cummins v Cummins* 8 Jo & La 64 92
 (g) *Jehangir v Bai Kajibai* 27 B 281
 (h) *Venkatachala v Vedagiri* 102 I C 841
 (i) *Sarat v Bhupendra* 25 C 103, *Greender v Makintosh* 4 C 897 *Lallubhai v Manikwarbhai* 2 B 388 d singd
 (j) *Chidambara v Krishnasami* 39 M 365 28 I C. 221

8 Administrator and Grant Whereas the property of a testator on his death vests at once in his executors irrespective of the grant of probate the property of deceased intestate does not vest in an administrator until he is appointed as such by a competent authority to administer the estate of the deceased (a) After the grant of letters of administration the administrator fully represents the estate (b)

9 Executor has no beneficial interest The executor is not entitled beneficially to any estate as against the parties who may have any interest therein So he cannot exclude the heir or the legatee (c) The rule of English common law which makes an executor beneficially entitled to the undisposed of residue of personal estate has never been applied in this country (d)

10 Survivorship Survivorship has the effect of rendering a will invalid only in respect to property which the testator could not dispose of at the time of his death All other dispositions made by him are valid It is property other than that which passed by survivorship (which the deceased has no right to dispose of) that vests in the executor (e) or administrator (f) It is no doubt the law that in an undivided Hindu family, when a coparcener dies there are no effects or property of his to which the surviving coparceners can succeed as his heirs, but they take the whole of the family property by right of survivorship' It is not necessary to take out letters of administration because there is no estate which can be called the estate of the deceased On his death family property vests in the surviving coparceners (g) It is not within the legal competence of any company to require the production of letters of administration from the survivor (h) Letters of administration will therefore be refused where there is an allegation in the petition that the property of the deceased has passed by survivorship to others (i) But a distinction has been drawn between a legal title and an equitable title and it has been held that letters of administration will be necessary where the legal title to the property of the deceased does not pass to the surviving coparceners though the beneficial title may so pass (j) Unless there is an admitted nucleus of family property the onus of proof of the existence of joint property lies on the claimant (k) In *re Desu Chetty* (l) letters of administration were ordered to be issued only on paying the proper fee on the share of the deceased's estate which the applicant got by survivorship

- (a) *Gonzales v Mathis* 7 I C 242
 (b) *Ambica v Kala* 10 C W N 422
 (c) *Brajanath v Anandamayil* 8 B L R. O C. J 208
 (d) *Lallubhal v Mankuwarbal* 2 B 358 406 *reid* to in *Toolsejdas v Premji* 13 B 61, *Taylor v Rajah of Parakkimedi* 32 M 443 453, *Manicklal v Mancherali* 1 P 269
 (e) *Jodi v Venkataswami* 38 M 367
Hat Harkor v Manicklal 12 B 621 (before Probate and Administra-

- tion Act)
 (f) *Re Balmukund* 126 I C 357
 (g) *Collector &c v Saichand* 27 B 140, *Bal Harkor v Manicklal* 12 B 621 *Re Balmukund* 126 I C 357
 (h) *Re Balmukund* 126 I C 357
 (i) *Kalkumar v Munabatt* 70 I C 155
 (j) *Bank of Bombay v Ambalal* 24 B 350
 (k) *Toolsejdas v Premji* 13 B 61
 (l) 33 M 93 19 M L. T 591

estate is not made good by the subsequent administration. It is only in those cases where the act is for the benefit of the estate that the relation back exists by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled' (a) Thus an administrator can only sue when the act done is for the benefit of the estate (b) or in due course of administration (c) An acknowledgment of a barred debt made prior to obtaining letters of administration is an act tending to the diminution of the intestate's estate and therefore is not made effectual by the subsequent grant, unless the grant was to the heir of the deceased (d)

Distinction between the effect of probate and of letters The distinction between the effect of a grant of probate and a grant of letters of administration is clearly shewn by reference to sections 220, 221, 227 While the probate of a will renders valid all intermediate acts of the executor as such, letters of administration do not render valid any intermediate act of the administrator tending to the diminution or damage of the intestate's estate as effectually as if the administration had been granted at the moment after his death In *Hiatu v Debendra* (e) a mortgage executed by the heirs of a deceased intestate prior to grant of administration was held not binding on the intestate's estate but see *Gonzales v. Makis* (f)

222 (S. 181. P. 6) (1) Probate shall be granted
 Probate only to only to an executor appointed by the
 appointed executor will

(S 182. P 7) (2) The appointment may be expressed or by necessary implication.

Illustrations

(i) A wills that C be his executor if B will not B is appointed executor by implication

(ii) A gives a legacy to B and several legacies to other persons, among the rest to his daughter in law C, and adds 'but should the within named C be not living I do constitute and appoint B my whole and sole executrix' C is appointed executrix by implication

(iii) A appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words,—'I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates' The nephew is appointed an executor by implication

(a) *Morgan v Thomas*, 8 Exch. 302, 307, see *Hiatu v Debendra*, 29 C. L. J. 58, 49 I C 532.

(b) *Morgan v Thomas* 8 Exch 302
 (c) *Hill v Curtis*, 1 Eq. 90 100.
Ellis v Ellis (1905) 1 Ch 613.

See *Crasie v Thomas* (1909) 2 Ch 342 W. 402, 12 Ed.

(d) *Raja Rama v Fakrudin*, 53 M.

480, 122 I. C. 504, but see S 220 note () An executor may make a binding promise to pay a barred debt, *Ibid*, *Pestonji v Bai Meherai*, 30 Bom. L. R. 1407, 112 I. C. 740.

(e) 29 C. L. J. 55, 49 I C 532

(f) 34 M. 395

Sub section (1) It states that probate is to be granted to an executor appointed by the will. The implication is that probate is to be granted of a testamentary instrument only,

1 Probate to be granted of what A document to be admitted to probate must have a testamentary character (a) Prima facie every document purporting to be testamentary, and signed and witnessed in accordance with the provisions of this Act ought to be admitted to probate (b) A document referring to succession to the writers entire property on his death has been held to be a will (c) The form is not of importance but it must comply with statutory requirements. Whatever be the form of a duly executed instrument if the person executing it intends that it shall not take effect until after his death it is testamentary (d) Thus where a person by some writing or memorandum revoked all prior testamentary instruments the Court ordered administration to issue with the memorandum annexed as that was a testamentary paper revoking all prior testamentary papers (e) Probate has been granted of wills executed in the form of deeds (i) when the intention of the writer of the paper was to convey benefits by the instrument which would be conveyed by it if it were considered as a will and (ii) death was the event which was to give effect to it (f) Extrinsic evidence is admissible to shew the intention with which an ambiguous paper has been executed (g) Then again a document not duly executed as a will may be incorporated by reference if the conditions of valid incorporation are complied with (h) A paper written between the date of the will and the date of codicil will be admitted to probate if the will read as speaking from the date of the execution of the codicil contain language which will incorporate the paper (i) But if the reference at the date of the codicil be to a future document then it will not be included in the probate (j) Documents in the form of letters (k) or of written answers to interrogatories (l) have been admitted to probate. Probate cannot be refused on the ground that the bequests contained in the will are illegal and void (m) or the executor is not a fit and proper person to be granted probate (n)

But in this country having regard to the definition of a will in S 2 (h) where property is not disposed of by the testator by an instrument it cannot be called a will. The mere fact that a manager (o) or a guardian (p) is appointed by a

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| <p>(a) <i>Van Straubenzee v Monck</i> 3 Sw Tr 6</p> <p>(b) <i>See Townsend v Moore</i> 1905 P 66</p> <p>(c) <i>Krishna Rao v Sundara Rao</i> 35 C W N 617 P C</p> <p>(d) <i>Cock v Cooke</i> 1 P & D 241</p> <p>(e) <i>Re Hubbard</i> 1 P & D 53 <i>Re Hicks</i> 1 P & D 683 <i>see Re Coles</i> 2 P & D 362 W 266</p> <p>(f) <i>Re Morgan</i> 1 P & D 214 <i>Foundling Hospital v Crane</i> (1911) 2 K. B 367 <i>Maung Thu v U Thananda</i> 5 Rang 571 <i>Balsano v Kishore</i> 15 C W N 1014 <i>Miles v Foden</i> 15 P D 105 <i>Uma Charan v Rakhal Das</i> 46 C L J 145</p> <p>(g) <i>Re Slinn</i> 15 P D 156 W 62 63 12 Ed</p> | <p>(h) <i>See Bal Gungobal v Blugwandas</i> 9 C W N 769 7 Bom L R 854 <i>See S 64 and note</i></p> <p>(i) <i>Re Truro</i> 1 P & D 201</p> <p>(j) <i>Re Smart</i> 1902 P 238 W 56 57 12 Ed</p> <p>(k) <i>Re Manly</i> 3 Sw & Tr 56 <i>Re Sprall</i> 1897 P 28</p> <p>(l) <i>Green v Shipworth</i> 1 Ph 11 53 W 31 12 Ed</p> <p>(m) <i>Thomas v Bal Dhanbalji</i> 12 B 164</p> <p>(n) <i>Hara Coomar v Doorgamoni</i> 21 C 195</p> <p>(o) <i>Chaitanya v Dayal</i> 9 C W N 1021</p> <p>(p) <i>Re Balwanar</i> 23 M 133 <i>see Tiaclun v Suresh</i> 16 I A 166 17 C 122</p> |
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document is not of itself sufficient to bring the document within the meaning of a will and to render probate necessary nor is it necessary where the document is a mere statement (a) or provides for succession to shebait (b) In English law an instrument only nominating an executor and not disposing of any property is regarded as a will and is admitted to probate (c) In India an instrument which does not dispose of property has no testamentary effect (d)

2 Whole instrument may not be admitted to probate Probate has been granted after striking out certain words which have been inserted without the testator's knowledge (e) but the Court cannot even by consent order a passage of the will to be expunged which a testator of sound mind intended to form part of it (f) Where a clause in a will has been inserted through fraud or inadvertence it may be rejected and probate granted of the remainder that is of the part only that is good (g)

3 Probate of lost wills In respect of lost wills probate may be granted after proof of due execution and attestation of the instruments of the contents thereof or of so much thereof as may be proved by satisfactory evidence (h) Where a will is not forthcoming probate may be granted of a codicil which stands unrevoked (i) So also where the will is revoked but the codicil is not (j)

4 Probate of wills of foreigners In respect of persons domiciled abroad probate is granted of his will in England if it be valid under the law of the country of his domicile or has been recognised as valid by the Court of that country (k) An expert may be called to prove the foreign law (l) Where a will has been probated in a foreign court it is the practice of the English Courts to require the codicil to be probated there also (m)

The object of a grant is to enable the executor or administrator to administer property in the country where the grant is made Where therefore a testator disposes of properties in England and in a foreign country and makes two wills with two different executors the function of the Court is exhausted in

- (a) *Bhagaban v Raghunundon* 22 I A 94 105 22 C. 843 857
- (b) *Chattanya v Doyal* 32 C 1082 9 C W N 1021 fold in *Baisnav v Kishore* 15 C. W N 1014
- (c) *Brownrigg v Pke* 7 P D 61 *Re Jordan* 1 P & D 555 W 131 12 Ed
- (d) *Bhagaban v Ram* 22 C 843 857
- (e) *Allen v McPherson* 1 H L C 191 *Morrell v Morrell* 7 P D 68 see *G sh v Rashbehary* 1 C L J 109 S 61
- (f) *Baisnav v Kishore* 15 C W N 1014 W cited
- (g) *Trimelstown v D Allen* 1 Dow & Cl 85 *Rhodes v Rhodes* 7 A C 197 *Baisnav v Kishore* 15 C. W N 1014

- (h) *Kedar v Sarojini* 3 C. W N 617, *Brown v Brown* 8 E & B 876 *Sugden v Lord St Leonards* 1 P D 154 *Woodward v Gaudstone* 11 A C. 469 See S 237 sq W 97 sq 12 Ed
- (i) *Black v Jobling* 1 P & D 685
- (j) *Re Savage* 2 P & D 78 W 95 12 Ed
- (k) *Enghin v Wylie* 10 H L C 1 *Miller v James* 3 P & D 4 *Whicker v Hume* 7 H L C. 124 *Bremer v Freeman* 10 Moo P C C 306 *Meyappa v Supramaniam* 43 I A 113 35 I C. 323
- (l) *Re Whitelegg* 1899 P 267 as to his qualification W 239 12 Ed
- (m) *Re Miller* 8 P D 167

that conjecture must not be taken for necessary implication, 'necessary implication means not natural necessity, but, so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. The question in each case is, do the provisions of the will confer upon the person, by necessary implication, the rights, powers and duties of an executor, if they do the person, thus clothed with the essential functions of the office, is an executor under the Will according to the tenor. But executorship according to the tenor will not be inferred where the will does not import that the person named shall collect the dues, pay the debts and legacies, and settle the estate like an executor. The mere designation to perform some trust, or to be the guardian of an infant legatee is not sufficient to show that the person who claims to be an executor is clothed with the rights and duties of the office. The test of constructive appointment may be found by considering whether the acts to be done or the powers to be exercised, are such as appertain to the office of an executor. the mere fact that a person is appointed a trustee or *shebast* does not make him an executor under the will. Yet where the testator uses the word trustee or *shebast* and, at the same time imposes upon the person, duties involving the functions of an executor, there is a good appointment as executor by necessary implication' (a) If consent of a person be necessary before an alienation of property, that person is not constituted an executor by implication. The test in such cases is 'whether the person in question is one to whom the execution of the last will of the testator is by his appointment confided', 'unless the Courts can gather from the words of the will, that the person named is required to pay the debts of the deceased and generally to administer the estate, it will not grant probate to him as executor according to the tenor thereof' (b) 'But the office of executor cannot be inferred by conjecture' (c) A mere direction to pay debts is not essential (d) in fact, it is not enough (e) A direction to pay debts out of the whole estate and not out of a particular fund may however make one an executor according to the tenor (f) An executor may be nominated for general purposes and another held to be executor according to the tenor for limited purposes (g) When there is an express appointment, it is less probable that there will be also an indirect appointment (h)

Where a testator says I will that during the minority of my son none shall deal with my estate except A, *held*, A was an executor (i) A direction to a person to dispose of property makes him an executor according to the tenor (j)

- (a) *Ameer v Mohanund* 6 C. L. J 453, see *Pulikkū v Thappalli*, 108 I C 409
 (b) *The Eastern &c v Reball* 3 C. L. J 260 see *Re Adamson* 3 P & D 253, *Re Lowry*, 3 P & D 157, *Re Lush*, 13 P. D 20, *Hamabai v Bamanji*, 7 B H C R A C J 64, *Re Courjon* 25 C. 65
 (c) *Re Woods* 1 P & D 556
 (d) *Re McKane* 21 L. R. 1
 (e) *Kuppa-jammal v Ammani*, 22 M 345 *Re Tooney* 3 Sw & Tr 562

- (f) *Re Cook* 1902 P. 114, *Re Tibby* 1902 P. 188, *Re Monolur* 5 C 756 *Promode v Kishna*, 1 C L J 301, *Re Baylis* 1 P & D 21, *Re Adamson* 3 P & D 253, *Re Lush* 13 P D 20 *Kuppa-jammal v Ammani* 22 M 345, *Arumilli v Arumilli* 54 M 266
 (g) *Lynch v Bellew*, 3 Phill 424
 (h) *Gunamani v Eswadian* 110 I C 439
 (i) *Brightman v Kelghley Cro* Lr 43 *Hamabai v Bamanji* 7 B H C R A C J 64
 (j) *Henfey v Henfey* 4 Moo P C 29 *Re Stanley* 1916 P. 192

3. No right The right referred to in this section must be a right based on or deduced from the title of the deceased intestate. Where in a suit therefore neither party relies as the basis of his own right on a previous title in a person who was the owner and who died intestate, there can be no question about administration and letters of administration have been held not to be necessary (a). The section also does not extend to a case where the property does not belong to the deceased intestate. Thus a mortgage debt was incurred after the death of a person intestate and therefore could not be his debt or give rise to a claim against his estate, *held*, this section had no application (b). Where, however, a debt was found to be due to a deceased partner, in a suit to recover the amount, letters of administration were held to be necessary (c). Whether a suit would lie to enforce a mortgage debt due from mortgagor's estate in the hands of his heirs without taking out letters of administration, see *Ratanbai v Narayandas* (d).

4. Letters of administration. Letters of administration must be of the whole estate, otherwise the estate will not be represented in a suit. A limited grant is not enough because it purports to deal with only a part of the estate such as the grantee is entitled to, and does not cover the whole estate (e). Letters of administration cannot be granted to a person who alleges that he is entitled to take the estate of the deceased by survivorship (f). The Court will also refuse to grant letters of administration where the person applying for it has been given secret instructions by the deceased regarding the disposal of his property and such instructions are suppressed with the intention of retaining the estate himself (g).

5. Have first been granted The plaintiff ought to show that the plaintiff has obtained letters of administration otherwise it shall be rejected. But if the letters be obtained before hearing, the Court may proceed with the suit (h). An executor however need not obtain probate before instituting a suit. It is enough if probate be obtained before decree (i). He can therefore institute an action in the character of executor before he proves the will though he cannot obtain a decree before probate. As an administrator derives his title solely from the grant, he can not institute an action before he gets his grant (j). The next section deals with the case of an executor or legatee seeking to establish in Court his right as executor or legatee.

(a) *Tuljaram v Bamanji*, 19 B 828

(b) *Ahmedabad &c v Ardesir*, 36 B 515, see *Farhall v Farhall*, 7 Ch 123

(c) *Chockalinga v Natesa*, 17 M 147

(d) 29 Bom L R 900, 104 I C 794

(e) *Framji v Adarji*, 18 B 337. See *Barnett Bros v Fowle*, 3 Rang 46

(f) *Kali v Munabai*, 70 I C 155, see notes S 211

(g) *Manuel v Coelho* 51 M 187, 18 M L J 158

(h) *Sethna v Hemingway* 38 B 618,

see S 50 C P C. see *Adm. Genl v Lalit*, 12 C W N 738, *Hormasji v Dhanbai* 31 Bom L R 511 120 I C 338

(i) *Chandra v Prasanna* 38 I A 7, 38 C 327

(j) *Chelly v Chelly*, 43 I A 113, 119 (on appeal from Straits Settlements) But in *Ma San v Ma Chit*, 127 I C 381, the Court held that a suit might be instituted and proceeded with but the operation of the decree would be suspended until the obtaining of the letters

10 Parsis The Parsis are not exempted from the operation of this section (a)

213 (S. 187). (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed

(S. 331. H. W. Act. 2). (2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57.

This clause "reproduces the corresponding important provision in the case of testate succession contained in sec 187 of Act X of 1865, with the important qualification provided for by sec 331 of Act X of 1865 and with the application of section 187 of Act X of 1865 read with section 2 of the Hindu Wills Act, (XXI of 1870)"—Notes on Clauses The words 'clauses (a) and (b) of, have been added by Act XVIII of 1923

1. The section The law as stated in the section is the same as in England, viz, that a person, who in Court has to prove title and has to deduce that title from a will whether that person is plaintiff or defendant, cannot do so without proving execution of the instrument by the production of probate or letters of administration with the will annexed (b)

The main object which the section has in view is that any will on which a claim is founded must be proved in a Court of Probate and that unless probate or letters of administration in respect of such will has or have been obtained the claim cannot be enforced (c) The section applies to the will of a Hindu, etc only when that will is governed by clauses (a) and (b) of S 57, a will and a codicil may have to be treated as separate instruments for the purpose of the application of S 213 (d)

2 Probate The section together with Ss 211 and 216 shows that where a testator has left a will and has appointed an executor, the executor, in order to bring a suit as such is bound to prove his title which can be done only by the production of the probate (e) Probate under S 2 means a

(a) *Framji v Adarji*, 18 B 337, Ahmedabad &c v Ardeshtir, 36 B 515

(b) *Parthasarathy v Subbaraya*, 72 I C. 559, *Caralapathi v Cola*, 33 M 91, 3 I C. 475 distd from see *Haji Mahomed v Masaji* 15 B 657, 669, *Ganeshdoss v Gulabi*, 50 M 927, 106 I C. 150, *Alemelammal v Surayaprakasaraoya*

38 M 988, 29 M L J 680 O 7, 4 C P C.

(c) *Chandra v Prasanna*, 4 C. L. J 523, 10 C. W. N 164 on app. 38 C. 327, 21 M L J 116.

(d) *Numbermal v Veetaperumal*, 59 M L J 596

(e) *Chelly v Chelly*, 43 I. A. 113, see also *Delaney v Rohamat*, 32 C. 710

copy of the will attached to the grant. A copy of the grant alone without a copy of the will attached is not sufficient proof of the executor's title (a). An order for the issue of probate is not enough (b). Under this section and in cases where it applies the executor is bound to apply for probate which means a copy of the will certified and sealed, and includes letters of administration with the will annexed, which may be granted by a Court of competent jurisdiction to a legatee (c) or to a residuary legatee (d), where the executor has not taken out probate.

The effect of this section coupled with S 273 really is to make the probate the title of the executor to the property and also to make it evidence of the contents of the will itself against all persons interested under the will. Where once probate has been granted to an executor it is not necessary for the legatee to obtain letters of administration, for the probate enures for the benefit of all parties (e). The result is that notwithstanding the terms of S 222 the grant of administration with the will annexed which a residuary legatee may obtain (under S 232) will satisfy the requirements of this section enabling the grantee to establish his claim (f). The grant of probate is the method which the law specifically provides for establishing the will. So long as the probate exists it is effectual for that purpose (g). No Court other than a Court of Probate can go behind the grant and interpret and modify its terms by the provisions of the will (h) or is competent to hold that letters of administration have been imperfectly or inaccurately drawn up (i). In a testamentary suit the subject-matter of the suit is the property of which the executor is the legal owner under the will of the testator and of which the probate declaring him to be executor recognises him before the Court as legal owner (j). Probate therefore establishes the will from the death of the testator and confers the title upon the executor who has obtained probate as legal owner (k).

The section applies not only to plaintiffs but to defendants as well. A defendant can rely on an unprobated will provided he does not do so in order to establish a right under a will. A defendant resisting a claim made by the heir at law cannot rely in defence on a will executed in his favour (l).

3 Right as executor. Since the passing of this Act it has been observed no executor can make title to any property of the testator, whether disposed of by the will or not, or can by sue for or claim any such property, or even

- (a) *Delaney v Rohamat* 32 C 710
 (b) *Alemelammal v Surayaprasasaroaya* 38 M 988
 (c) *Mun Mohun v Puresh* 22 W R 174 Sec S 229 sq for grant of letters of administration with the will annexed to a legatee
 (d) *Gordhandas v Bal Ramcooker* 26 B 267
 (e) *Brasanath v Anandamozi* 8 B L R 208
 (f) *Gordhandas v Ramcooker* 26 B

- 267, *Chandra v Prasanna* 38 C 327, 21 M L J 116 M 560
 (g) *Komolothun v Nilrutton* 4 C 360 cited in *Narrondas v Narrondas* 31 B 418
 (h) *Delaney v Rohamat* 32 C 710
 (i) *Sulumar v Bharat* 20 C L J 148 26 J C 980
 (j) *Re Dowbal* 18 B 237
 (k) *Sakli v Ram* 55 J C 504
 (l) *Ganshamdoss v Gulabai* Bal 50 M 927 106 J C 150

clothe himself with his representative character for the purpose of collecting or paying debts, or otherwise legally intermeddling with the affairs of the testator, without first obtaining probate of the will (a).

A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased testator unless he has either administered, that is, intermeddled with the estate, or proved the will, that is taken out probate, and consequently the seizure and sale of part of the testator's assets under an execution founded upon a judgment in a suit against an executor named in the will is ineffectual to bind the testator's estate (b). An executor cannot be sued until he has accepted the position of executor and he cannot be said to have fully accepted the position until he has obtained a grant. An order for a grant is not enough (c).

The position of an executor who does not take out probate is the same as that of a Hindu or Muhammadan executor before the Succession Act (d). Probate to one enures for the benefit of all, is sufficient evidence of title in all, therefore on death of one the others may act without taking fresh probate (e), even executors who have not obtained probate may join with those who have in bringing actions (f). Probate is necessary to establish the right of an executor of a testator who was a remote predecessor in title (g).

4. Right as legatee. A person claiming as legatee under a will is not entitled to enforce his right by suit unless probate of the will has first been obtained (h). But the corresponding section (S. 187) of the Act of 1865 included in the Hindu Wills Act was held not to affect the provisions of the Administrator General's Act (II of 1874). Therefore if the assets do not exceed Rs. 1000/- (now Rs. 2000/-) probate is not necessary, the certificate of the Administrator General will entitle the legatee to sue (i). Letters of administration with the will or with a copy of an authenticated copy of the will annexed will do in place of probate. The terms of the will can be proved only by a reference to the probate or letters of administration, as the case may be (j). A grant of administration with the will annexed to one legatee will entitle any other legatee to bring a suit. Where a will is proved and letters of administration are granted by the District Court, subsequently the High Court directs a limited grant to be made but before such letters were issued the legatee died and another legatee brought a suit, held, the subsequent limitation of the grant, but without actual recall of the letters on account of the death of the legatee, was immaterial (k).

(a) *Behary v. Juggo*, 4 C. L. 1, see S. 211 note 12.

(b) *Altofamide v. Pitchay*, 1874 A. C. 437. *Balkrishna v. Onen'al & Co.*, 4 Bom. L. R. 340.

(c) *Lalh. v. Umakan'ta*, 14 C. W. N. 256.

(d) *Salina v. Mahomed*, 37 C. 839. 15 C. W. N. 165.

(e) *Comm. v. Comm.*, Ja. & L. 64, 92.

(f) *W'elster v. Spencer*, 3 B. & All. 360.

(g) *Hazi Mahomed v. Musaji*, 15 B. 657, 669.

(h) *Behary v. Juggo*, 4 C. L. 1.

(i) *Nataran v. Pandurang*, 34 B. 505. 12 Bom. L. R. 471.

(j) *Sakumar v. Elanet*, 20 C. L. J. 148, 26 L. C. 952.

(k) *Chandra v. Prasanna*, 4 C. L. J. 523, 10 C. W. N. 864 on app. 35 C. 327, 21 M. L. J. 115.

In *Alamelammal v Suryaprakāsaroya* (a) the heir of a legatee brought a suit for an order on the defendant to apply for probate or of administration of the estate. An application for probate had been made and fiat of the Judge was obtained but probate was not actually issued of the for non payment of the Court fees. *Held* (1) the case was governed by this section, (2) the plaintiff as heir of the legatee occupied the position of the legatee (3) the fiat for the grant of probate was conditional and therefore not equivalent to the grant of probate (b) (4) the plaintiff must establish her title by production of the probate, a fiat being insufficient for the purpose (5) the plaintiff could not put in the actual will as an ordinary exhibit but must prove the execution of the document by producing probate or letters of administration as required by this section.

Where, however, a suit was brought by a beneficiary under a trust imposed on a legatee, and not to establish a claim as legatee *Sankaran Nair J* held that the suit was to enforce an obligation and not to establish a claim therefore this section had no application. *Wallis C J* however was of opinion that the suit failed as there had been no grant of probate or of letters of administration (c).

A legatee may sue for his legacy or for accounts (d). Such a suit against an executor must proceed either in the form of an administration suit (e) or otherwise (f). It is only where an executor fails to propound a will that the legatee may himself propound it. Otherwise if the will be once proved and the probate or letters granted it is not necessary under this section that every legatee claiming under the will should separately apply for probate and prove the will (g). A legatee is not bound to assert his title under the will till it has been probated, and omission of such assertion cannot prejudicially affect him (h).

Where an executor named applies to be sued in place of persons sued as being in possession of the estate if the substitution be not made the estate is not affected by the decree or sale in execution (i). Where an executor took out probate but died pending litigation, the High Court granted time in order that the estate might be duly represented (j).

5 Position of the heir or person in possession of the estate. A decree may be made against the sons as legal representatives of the deceased although the deceased debtor may have left no assets (k). Until some other claimant comes forward the party who takes possession of the estate of a deceased Hindu before issue of probate must be treated for some purposes as his representative and a decree obtained against such a party is not a mere nullity. It is at any rate sufficient to enable the plaintiff to bring a suit against the executor

- (a) 38 M 928 31 I C 491
 (b) *Munglitram v Gurusahal* 17 C 347 distd
 (c) *Manuel Kunha v Inana Coelho* 31 M 187 204 18 M L J 158 176
 (d) *Curseljee v Dadabhai* 19 M 425
 (e) *Re Ram Chand* 5 C 2 *Bidhaltee v Mully Lal* 21 C 832
 (f) *Punhollam v Kala Goindji* 26 B 301

- (g) *Chandra v Prasanna* 4 C L J 523
 (h) *Akhil v Nanibala* 12 C L J 426 see *Udt v Radhika* 6 C L J 662 M 560
 (i) *Harish v Pundia* 12 C L J 51 14 C W N 1041
 (j) *Malangini v Cioancymone* 22 C 903
 (k) *Lallu v Tribhuvan* 13 B 653

he gets his grant (a) The stage at which the executor has to prove his title is as a rule the hearing (b) In *Gordhandas v Bai Ramcoover* (c) the decree was not allowed to be drawn up till the plaintiff had obtained letters of administration with the will annexed In *Hormasji v Dhanbaji* (d) a party was allowed to be added as representing the estate of a deceased claimant on her undertaking to take out probate or letters of administration prior to the decree being drawn up in the suit which was then under appeal The practice of the Bombay High Court that decree is not to be sealed until probate is granted is not correct (e)

Where a debtor does not dispute the debt but requires production of probate before making payment to the executors the Court can and will stay proceedings taken by the executors until production of probate (f) An executor can also in his personal capacity maintain an action in respect of property of which he has been in actual possession (g) but when possession is in dispute he must prove his title as executor (h) If an executor elect to act he may be sued before probate and cannot afterwards renounce (i) But the Court will not allow an action to be brought against one appointed executor who has never meant to act before he has had an opportunity of renouncing (j) nor will it make an order for general administration in the absence of a duly constituted legal representative (k) In *Surbomungola v Mohendronath* (l) a suit for construction of the will and for administration was allowed to be brought by the testator's sole heirress when the executor had renounced without taking out letters of administration

8 When probate is not necessary In cases not covered by this section (see sub sec 2) there is no law which obliges a person claiming under a will to obtain probate or otherwise to establish his right as executor administrator or legatee before he can sue in respect of any property of the deceased which he claims under the will (m) Nor is probate (or letters of administration) necessary in respect of wills antecedent to the Hindu Wills Act (n) Probate is not necessary for a person claiming an appointment as guardian under a will (o)

- (a) *Chetty v Chetty* 43 I A 113
 (b) *Re Masonic & Co* 32 Ch D 373
 (c) 26 B 449 475 see *Janaki v Hafiz*
 13 C 47 *Ratchand v Jitraj* 33
 Bom L R 1372
 (d) 31 Bom L R 511 120 I C
 339
 (e) *Ratchand v Jitraj* 33 Bom L R
 1372
 (f) *Tam v Commercial Bank & Co* 12
 Q B D 294 cited in *Hormasji*
v Dhanbaji 31 Bom L R 511
 120 I C 338
 (g) *Oughton v Seppings* 1 B & Ald
 241
 (h) *Pinney v Pinney* 8 B & C 335
 (i) *Webster v Webster* 10 Ves 93
 (j) *Lickers v Bell* 4 D G J & Sm
 274 *Re Locett* (1876) 3 Ch
 D 198 *Re Stevens* (1877) 1 Ch

- 422
 (j) *Douglas v Forrest* 4 Bng 685
 704
 (k) *Crescor v Robinson* 14 Beav 589
Cay v Hills 15 Eq 79 *Roswell*
v Morris 17 Eq 20 *Coole v*
Whittington 16 Eq 534 H Vol
 14 p 1456 W
 (l) 4 C 509
 (m) *Bhagansang v Becharas* 6 B 73
 (n) *Krishna v Panchuram* 17 C 272
Krishna v Rai Mohun 14 C 37
Shahk Moosa v Shahk Essa 8 B
 241 *Kanhaiya Lal v Munni* 18
 A 260 Probate is necessary in
 respect of wills falling under the
 Hindu Wills Act *Shahk Moosa v*
Shahk Essa 8 B 241
 (o) *Pathan Allfan v Bai Pantat*
 19 B 832

nor is it necessary where the assets do not exceed Rs 1000 (a) (now Rs 2000/-, Administrator General's Act III of 1913, S 31)

There is no provision of law which renders it obligatory in the case of a Muhammadan will to take probate. After due proof such will is admissible in evidence without probate having been obtained. But probate may be obtained of a Muhammadan will (b). The executors of a will made by a Muhammadan can validly sell and convey the testator's property without taking out probate or obtaining the consent of all the heirs (c).

9 Sub clause (2) The sub-clause has a long history behind it. Probate and letters of administration granted to persons other than those governed by the Succession Act or the Hindu Wills Act had a very limited effect, viz, it did not vest the estate in the executor or administrator but took effect only for the purpose of recovering debts and securing debtors paying the same (d). The Hindu Wills Act made Ss 179 (211) and 187 (213) applicable to the wills of Hindus with the result that where the Act applied executors and administrators acquired the same rights with the same restrictions as under the English law. Then came the Probate and Administration Act an Act framed with the object of making it applicable to all persons in this country other than those governed by the Succession Act whilst leaving the existing law as to Hindus to whom the Hindu Wills Act applied, untouched. This section was retained in the Hindu Wills Act and with the exception of this section all the other sections relating to the grant of probate and the administration were incorporated in the new Act. This was done 'advisedly and of intention'. The result was that this section applied only to those persons who were governed by the Succession Act and the Hindu Wills Act and to no others. The executor or legatee therefore of a Muhammadan or of a Hindu testator not governed by the Hindu Wills Act can establish a right without obtaining probate (e). The present Act being only a consolidating measure this Sub-Section has been inserted to give effect to the law as it stood before the Act came to be passed.

214 (S. C. 4) (1) No Court shall—

Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt,

(a) *Narayan v Pandurang* 34 B 506
12 Bom L R 471

(b) *Syed Abdul v Badaruddin* 28 C. W N 295 298 9 As to its effect see *Kurmulain v Abbas Hessein* 32 I A 244 33 C 116.

(c) *Sr Mahomed v Hargovandas* 24

Bom L R 753

(d) See ante p 461

(e) *Shah Moosa v Shaik Essa* 8 B 241 see *Sakina Bibee v Mahomed* 37 C 839 *Namberumal v Veera perumal* 59 M L J 596 128 I C 639

except on the production, by the person so claiming, of—

- (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or
 - (ii) a certificate granted under section 31 or section 32 of the Administrator General's Act, 1913, and having the debt mentioned therein; or
 - (iii) a succession certificate granted under Part X and having the debt specified therein; or
 - (iv) a certificate granted under the Succession Certificate Act, 1889, or
 - (v) a certificate granted under Bombay Regulation No. VIII of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.
- (2) The word "debt" :
 debt except rent, revenue
 land used for agricultural ;

2. Succession Certificate Act. "The grant of probate or letters of administration establishes the general representative character of the grantee, whereas the Succession Certificate Act limits the power of the certificate-holder, as regards the collection of debts and securities of the deceased person, to those debts and securities only which are specified in the certificate. Besides, the representative character of a certificate-holder is not conclusive, being liable to be set aside by a regular suit" (a). With regard to the scope of the Succession Certificate Act it has been said, "All that it purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of deceased persons against the difficulty which may occur when disputes arise as to whether a claimant is or is not entitled as such personal representative" (b). Therefore, before a decree can be passed against a claimant suing in the capacity of a personal representative of a deceased person satisfactory proof must be given by the claimant of his representative character. Such proof is furnished by probate or letters of administration under clause (i) or a certificate under clauses (ii)-(v). The preamble to Act VII of 1889 stated that the Act was intended to facilitate the collection of debts on succession and offered protection to parties paying debts to the representatives of deceased persons. The Act was intended to offer

(a) Speech of Mr. Evans, Gazette of India, 22 Oct 1881, Part I p 524. See S. 21 of the Act (VII) of 1889, now S. 215. See Part X, notes

(b) *Gowami Sri Roman v. Haridas*, 38 A. 474, *Ghafur v. Kalondari*, 33 A. 327.

protection to debtors; and to assure them that the certificate holder was the person entitled as successor to the effects of the deceased person to receive payment of the debt (a). The section prohibits a Court from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or any part thereof, or from proceeding upon the application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except upon production of one or other of the prescribed certificates (b). A person is not under a legal obligation to pay the debt of a deceased person (d) and no such debt can be enforced by the Courts until the prescribed certificate has been obtained (e). In the absence of such evidence, the Court is not bound to pass a decree in favour of the plaintiff, and the order for the payment of debts; thus, it does not apply to the payment of debts of a deceased person.

legal remedies against the executor or legatee can be obtained. The section should be carefully read in connection with the provisions of the Act relating to the powers of the Court in matters of this kind. The section should be carefully read in connection with the provisions of the Act relating to the powers of the Court in matters of this kind.

4. Pass a decree. These words have to be understood in their plain literal sense. The Court is therefore competent to entertain a suit on investigation, and to pass a decree in favour of the plaintiff if the certificate is produced. To that extent S 303 of the Act applies.

- (a) *Goswami (Sri) Ramani v. Haldas*, 38 A 1474 (Sahabuddin v. Sahabuddin), 118 J. 658, 112 in C.W. N. 1145 (Sahabuddin v. Sahabuddin), 27 C. L. J.

It is to be noted that the Court is not bound to stay its hand.

the Civil Procedure Code is modified by this section (a) The section applies to the passing of a compromise decree (b) as also of a decree in favour of a person substituted as plaintiff for one who has died pending a suit for recovery of money due on a bond (c) The certificate is necessary for the heirs of a deceased creditor to recover a debt existing in the lifetime of a creditor which did not become payable until after his death (d) A Court has no jurisdiction to pass a decree and stay execution till the filing of a certificate (e) A certificate is necessary in respect of wills probated in foreign Courts, and no decree can be passed in British India without a fresh grant or a certificate in British India (f)

5 Time for production of certificates A Court is fully competent to deal with a case if the certificate be produced at any time before the decree is made (g) Its production is not a condition precedent to the institution of a suit, but if there be reasonable doubt as to the identity of the person entitled to payment, the plaintiff may be required to obtain a certificate under the Act (h) The certificate must be produced when the court of first instance is ready to pronounce its judgment, its subsequent production is of no avail as it has no retrospective operation (i) but it has been held that the certificate may be produced in the Appeal Court (j) and the Appeal Court should grant time for the production of the certificate (k) It has been doubted whether any objection can be raised under this section in the Appeal Court when the objection was not raised in the first Court (l)

6 Opportunity to be given for production of the certificate The Court should not dismiss a suit because no certificate has been filed by the plaintiff, but time should be allowed to him to obtain probate or certificate (m) Where time has been allowed and the plaintiff fails to produce a certificate the suit should be dismissed (n) Where a party is diligent but fails to obtain the certificate within the time allowed, further time should be granted to him (o)

7. Of his debt His debt means his share of the debt Thus where A and B jointly advanced monies to P Q and R, and B died and B's widow as his heir

- (a) *Rajaram v Malan*, 57 I C 650,
Lachmi v Ganga 4 A 485
Ramanugrah v Chunt 27 I C
822 *Alice Thorp v Shamalullah*
3 Pat L J 160 44 I C 733
(b) *Sanjoli v Raci* 15 B 105
(c) *Nepul v Nasraddin* 27 C L J
400
(d) *Banchharam v. Adyanath* 36 C
936 13 C W N 966
(e) *Aracamudat v Kalia* 24 I C 143
(f) *Manasing v Amad* 17 M 14 (will
probated in a state in Cutch)
(g) *Chandia v Prasanna* 38 I A 7
38 C. 327, *Zabur v Puran* 78
I C. 307 *Gulshan v Zakir* 42
A 549 57 I C 55
(h) *Re Ramdas* 10 B 107
(i) *Fatch Chand v Muhammad*, 16 A
259 266 F B *Kasumari v*
Makkhu 42 A 1 96 I C. 478
Nanha v Sunda 71 I C. 840,
Muralidhar v Achini 19 C W N

- 794 note 30 I C 510
(k) *Zabur v Puran* 78 I C 307, 5
Pat L T 504 foling *Ammasi v*
Appalu 29 I C 234, *Shuja v*
Ram 20 A 118
(l) *Umesh v Mothuro* 28 C. 246, 5
C. W N 607 see *Roghu v*
Poresh 15 C 54
(m) *Alice Thorp v Shamal* 44 I C.
733 *Nanha v Sunda*, 71 I C
840 (see cases cited), *Zabur v*
Puran 78 I C 307 *Ramanugrah*
v Chunt 27 I C 822 *Jowad v*
Kamlapat 56 I C. 641, 18 A L
J 514 *Chaing Na v Shree Ok*
63 I C 807 13 Bur L. T 233
Valrovan v Shilease 44 M 499
F B; *Pichalkittia v Ranganadan*
28 M L J 323, 28 I C 490;
Manasing v Amad 17 M 14;
Shuja v Ram 20 A. 118.
(n) *Karuppasami v Pchu* 15 M 419
(o) *Peila v Fernandez* 12 I C 172

transferred his interest in the debt to A and A brought a suit making B a widow a *pro forma* defendant held a certificate was not necessary, but if B or her wished to be placed in the category of a plaintiff a certificate would be necessary (a) A debt does not include a sum due to the deceased but wrongfully collected by another, such a person is not a debtor of the deceased (b)

B A person claiming as Assignee etc. Although the section does not expressly refer to assigns of heirs of deceased persons the assignees can be in no better position than the assignors and derivative debtors of the protection guaranteed to them by the Act and evade the statutory obligation imposed upon them by this section (c) An assignee of the heirs a deceased creditor of their rights under a simple mortgage must produce a succession certificate. The assignment of a debt does not make it cease to be part of the deceased creditor's effects. An assignee must obtain a certificate before he can realise the debt (d) The reason is if cases of assignment from the deceased's legal representatives were excluded, evasion of the Act would be easy and the protection afforded to the debtor would be illusory (e) A purchaser of a debt sold in execution of a decree is a person claiming to be entitled to the effects of a deceased person and must obtain a certificate to recover the debt (f) An assignee is entitled to a certificate where none has been obtained by the assignor (g) The representatives of an assignee by devise of a debt cannot sue to recover the debt without probate of the will or a certificate to realise the debts of the estate (h) Where the assignor, one of several heirs of the deceased creditor, had obtained a certificate but not the assignee, it was observed that the person to sue for the debt must be the person to whom the certificate was granted (i) But this view has not been accepted in other cases (j) On an application for a certificate by an assignee the only question for determination is whether the applicant is the representative of the person to whom the debt is alleged to have been due (k)

9. Death of plaintiff. Upon the death of a plaintiff *pendente lite*, though the suit may be continued by his representatives, a certificate in proof of his representative title must be produced before a decree can be passed in his favour (l), but the section is not a bar to execution proceedings. Therefore on

- (a) *Shital v Manik*, 9 C L J 331, 11 C 254. See notes below
- (b) *Sahab Ram v Gobind*, 17 A L J 268, 69 I C 774
- (c) *Karuppasami v Pitchu*, 15 M 419, 2 M L J 115. *Ramchariter v Ram Narain*, 40 I C 96 (succession certificate may be granted to the assignee of the representative of a deceased person) see S 214 n 7.
- (d) *Gulshan v Zahkiri*, 42 A 549 57 I C 55 (see cases discussed), but see *Shital v Manik*, 9 C L J 331
- (e) *Valracon v Srinivasa*, 44 M 499 62 I C 944 F. B
- (f) *Manchatam v Bai Mahali*, 18 B 315

- (g) *Radhika v. S of S for India*, 38 A. 438, 35 I C 711
- (h) *Shodone v. Halalkhore*, 4 C 645
- (i) *Allahdad v Sant Ram* 35 A 74, 17 I C 486
- (j) *Ranglal v Annulal*, 36 A 21, 22 I C 349. *Goswami Sri Raman v Hari*, 38 A 474, 14 A L J 677. *Arunachalam v Mathu*, 42 M 130
- (k) *Radhika v S S. for India*, 38 A. 438 35 I C 711
- (l) *Nepusi v Nasiruddin*, 45 I C 730, *Sahadeo v Sakhawati* 7 C L J 658, 12 C. W. N 145. *Torregrosa v Pragji*, 16 B 519. *Baldnath v Shamanand*, 22 C. 143 *reld to*

the death of the plaintiff during the pendency of such proceedings his legal representatives substituted in his place, need not produce any succession certificate (c). There is a difference in the wording of the two clauses of sub-section (1). Cl. (a) contemplates the point of time when the decree is passed, cl. (b) refers to the point of time when the Courts are called upon to proceed on the basis of the application for execution (b).

'Reversioners' must take out a succession certificate and this right is not affected by the interposition of the estate of the widow (c). Where a Hindu sues upon a bond executed in the name of his deceased father, the presumption of law, in the absence of any admission or evidence to the contrary, is that the debt under the bond is one due to the joint family and no succession certificate need be produced (d). In case of a bond executed by a Hindu in the name of his deceased father, the presumption of law is that the debt is one due to the joint family and no succession certificate need be produced (d).

10. On succession. These words have been added in clause (a) of sub-section (1) and in the heading of Part VIII to make it clear that, no change has been made in the existing law (e). A succession certificate is not necessary where property passes by survivorship and not by succession (f). The succession certificate procedure is obligatory on any person claiming debts or debt the property of the deceased not only by succession but under any title whatever except in case of succession by survivorship. In case of self-acquired property under Mitakshara law the undivided sons do not succeed by survivorship and the certificate is necessary (g). The presumption of law, in the absence of evidence or of admission to the contrary, is that the debt due under a bond is one due to the joint family and no certificate need be produced (h). So also, where the plaintiff is proved to have been a member of the joint family with the deceased, the presumption is that it is a family debt and no certificate need be produced (i). Where a promissory note was executed in favour of a governed by Dayabhaga law, and on his death a favour of another member then the Karta of the deceased member could sue the debtor without a certificate as they were suing on the renewed note in their own right and not as heirs of the deceased member (j). An adopted son is not bound to produce a certificate to recover what is found to be ancestral property (k), nor an illegitimate son to recover a debt due to his father (l). Where the right to maintenance was such that

(a) *Asheta v. Azizulla* 571 C 902
(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

98 I C 872 *Varadarajulu v. Velaiah* (90 I C 743) (1914)
(g)

(h)

(i)

(j) *Jagannadas v. Allu* 19 B 1338

(k) *Palechuray Bhagmat* 17 A 578

(l) *Mohammad v. Parbhall* 18 I C 223

(m) *Pichaittillai v. Ranganathan*

(n)

dash of two grantees was entitled to take by survivorship to the other, then a certificate is not necessary for a surviving grantee to recover the arrears of maintenance on the death of the other (a) There is no survivorship in a partnership concern, therefore, a certificate is required for a surviving partner to be entitled to the effects of a deceased partner (b)

11. Subsec. (1), cl. (b). The Court shall not proceed to execution until a certificate has been produced, but application for execution need not be accompanied by a certificate (c) An application for execution of a decree will therefore lie without the production of a certificate or other documents mentioned in this section (d)

12. Subsec. (1), cl. (b). This clause makes it perfectly clear that probate or letters of administration with or without a copy of the will annexed evidencing a grant of administration to the estate of the deceased renders a succession certificate unnecessary (e)

13. Subsec. (2), Debt. The word Debt as used in this sub-section is a comprehensive term which should receive a liberal construction (f). Debt means a sum of money which is now payable or will become payable in future by reason of a present obligation (g) "The law has always recognised as a debt two kinds of debt a debt payable at the time and a debt payable in the future" (h) In *Abdul v. Magbulunnissa* (i) it was held that a debt which falls due on the death of a person is one contemplated by this section. A dower debt of a Muhammadan wife, whether prompt or deferred is a debt (j) A debt implies a liability for a liquidated amount or ascertained sum for which there is a present obligation to pay. Any sum which may be found due when the accounts are taken is not a debt within the meaning of this section (k) A suit for account is not a suit for a recovery of a debt (l) An action to recover the value of goods from the tenants of a deceased landlord is not a debt (m) A suit for the refund of the price of goods sold but not delivered is a suit for the recovery of a debt (n) The Court will have to determine whether the amount set out as a debt is really a debt under this section (o)

It has been held by the High Court of Calcutta that the section does not require the certificate to cover all the debts or even the whole of a particular

(a) *Mathura v. Rukmini* 17 C. L. J. 87

(b) *Guruditta v. Dhari*, 31 I. C. 904
See note (15)

(c) *Kalian v. Ram* 18 A. 34, *Mangal v. Salimullah* 16 A. 26, *Brojo v. Isswar* 19 C. 482, *Dhokal v. Phakkar*, 15 A. 84 see *Hafizuddin v. Abdool*, 20 C. 755

(d) *Balkishan v. Wagarasing* 20 B. 76, *Holi Lal v. Hardeo*, 5 A. 212

(e) *Ramanugrah v. Chuni*, 27 I. C. 822

(f) *Annapurna v. Nalini* 42 C. 10

(g) *Banchahram v. Adyanath* 36 C. 936, 13 C. W. N. 966 F. B.

(h) *Webb v. Stenton* 11 Q. B. D. 518

(i) 30 A. 315, 5 A. L. J. 598, *Nemdhari v. Bissessar*, 2 C. W. N. 591 disappd.

(j) *Ghafur v. Kalandari* 33 A. 327, *Bancharam v. Adyanath* 36 C. 936 F. B. overruling *Nemdhari v. Bissessar* 2 C. W. N. 591

(k) *Sabju v. Noordin* 22 M. 139

(l) *Bissessar v. Durgadas* 32 C. 418

(m) *Ma Hla v. Maung* 75 I. C. 237, *Subbanna v. Munekka*, 18 M. 457, see *Sahadeo v. Sakhawati*, 12 C. W. N. 145

(n) *Kolla Pinta v. Vanthi Reddi* 2 M. L. J. 34

(o) *Annapurna v. Nalini* 42 C. 10

debt of the deceased (a) But a different view has been taken by the Allahabad and Lahore High Courts (b)

14 Joint debt A son is *prima facie* taken to succeed to his father by right of inheritance unless his succession by survivorship is indicated on the face of the bond creating the debt In the latter case no certificate is necessary (c) This view did not commend itself to the judges in *Subramanian v Rakku* (d) where it was laid down that if the debt be found to be a joint debt no certificate was necessary In case of a joint debt the right to execute the decree devolves by survivorship but if the debt be the separate property of the deceased the certificate must be obtained (e) In case of joint creditors governed by the Bengal School it has been held a suit by a surviving creditor is maintainable with the heir of the deceased creditor as defendant in the suit at any rate to the extent of the plaintiff's share in the claim But if the heir choose to join as co plaintiff an opportunity should be given to him to obtain the succession certificate (f)

A person who owes a debt to a deceased person is under no legal obligation to pay the debt to any person who does not produce a certificate or probate or letters of administration or some authority to collect debts due the to deceased person (g)

A certificate can only be granted for a specified debt or debts of a deceased person and it cannot be obtained for more debts than the applicant wishes to collect (h)

15 Partnership debts Where the members of a firm instituted a suit and a partner died *pendente lite* and his legal representative (who did not produce a certificate) was added as a plaintiff the name of the legal representative was ordered to be struck out and the claim was decreed in full (i) There is no survivorship among partners but the remedy survives to the surviving partner The decree would not be a decree against the debtor of a deceased person but it would be a decree against the debtor of a partnership concern (j) The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the life time of the deceased partner (k) But a succession certificate is required if the surviving partner

- (a) *Mohamed v Sarifan* 16 C W N 231
Annapurna v Nalni 42 C 10 (see case cited) see *Greenkosa v Sundararaja* 17 M L J 37,
Bassa v Amir 24 I C 693 (Punjab)
 The law has since been changed See S 372 (3)
 (b) *Ghaffur v Kalandari* 33 A 377 F B (see cases cited) *Sharifunnissa v Musam* 42 A 347
Sugra v Muhammad 43 A 341 but see *Albar v Biktara* 1901 A W N 125
Sakat v Katori 21 A L J 122 71 I C 376
Benka v Benkara 14 M 377
 see *Chockalinga v Natesa* 17 M

- 147
 (d) 20 M 232
 (e) *Raghacendia v Bhima* 16 B 349
 (f) *Shital v Manik* 13 C W N 509
 (g) *Thakar v Firm Bashi & Co* 64 I C 385
Golak v Craddock 72 P R 1902 fold
 (h) *Re Indarman* 18 A 45
Annapurna v Nalni 42 C 10 14 18 C W N 836
 (i) *Nal Kissen v Kanhya* 17 C L J 648 21 I C 569
 (j) *Puln v Abdul* 44 I C 911
 (k) *Motlal v Chellabhai* 17 B 6
Ugar v Lakhmi 32 A 63^a 7 A L J 759

claims to be entitled to the effects of the deceased partner as due to himself alone (a) or if the heir of the deceased partner seek to recover the share of the deceased from the partnership concern (b), or if the heir of a deceased partner be joined as a plaintiff (c).

16 Where certificate is not necessary Where there is no relation of debtor and creditor, but a person wrongfully receives money to which another is entitled (d) a succession certificate is not necessary, nor it is necessary for the recovery of goods entrusted by one person to another (e) A certificate is not necessary, unless required by some special enactment, in case of a person appointed by Court to take charge of the properties of the deceased, e.g., a receiver (f), or a curator (g), or trustee of an endowment (h) An illegitimate son of a *sudra* can be a coparcener with his father and will be competent to sue without a certificate (i), so also the heir of the wife is competent to sue the heir of the husband for the recovery of the proportionate share of the wife's dower (j) It is not necessary to take out a certificate when the decreeholder dies during the pendency of the execution proceedings (k), nor where execution is sought on the death of the decree holder by a person who claims not as heir of the deceased but under an assignment or conveyance from him (l) The absence of a certificate is no bar to the filing of an award (m) A certificate is not necessary to recover insurance money (n) but the contrary has also been held (o) Whether in a suit by a successor to an impartible estate he is bound to produce a succession certificate, before he can obtain a decree for payment of a debt due to the last holder of the Raj, has been answered both in the affirmative (p) and negative (q)

17 Mortgage The representatives of a mortgagee seeking relief against the mortgaged property alone need not take out a certificate (r) but it is necessary to enable a mortgagee to obtain a money decree, that is where personal remedy is sought (s) No certificate is necessary where the right to obtain a money-decree accrues for the first time to the heirs of the deceased mortgagee (t), nor

(a) *Guriffa v Dhari* 31 I C 934

(b) *Debi v Nirpal*, 20 A 365

(c) *Vaidyanatha v Chinnaasami*, 17 M 108

(d) *Narayan v Talia* 15 B 580, *Saheb Ram v Govindi*, 60 I C 774

(e) *Subbanna v Munekka* 18 M 457, see *Sahib Ram v Govindi*, 43 A 440

(f) *Hanhar v Hatendra* 37 C 754, 12 C. L. J 252

(g) *Babasaheb v Narsappa*, 20 B 437

(h) *Jogendra v Ram* 20 C 103, *Mallikarjuna v Sridevamma* 20 M 162 P C 24 I A. 73

(i) *Ganulal v Kashiram*, 63 I C 417

(j) *Shadi Jan v Waris Ali* 43 A 493

(k) *Kahetra v Azizullah*, 57 I C 902, see *Nazirul v Abdul*, 89 I C 811

(l) *Nazirul v Abdul*, 89 I C 811

(m) *Ram v Bapu*, 16 B 240

(n) *Srinivasa v Ranganayaki*, 32 I C 991, *Charusila v Jyotish*, 33 I C 157 (see cases cited to)

(o) *Vittal v Hanumantha*, 50 M 412

(p) *Rajah of Kalahasti v Achigadu* 30 M 454

(q) *Gur Pershad v Dhani*, 38 C 182, 15 C. W N 49

(r) *Kanchan v Baijnath*, 19 C 336, *Baldnath v Shamanand* 22 C 143, *Hanuman v Dilraj* 50 I C 271 *Palaniyandi v Veerammal* 29 M 77, *Nanchand v Yenawa* 28 B 63 but see *Fatehchand v Muhammad* 16 A 259 F B

(s) *Sahadeo v Sakhamal*, 7 C L J 658 663, 12 C. W N 145 (subject fully dealt with) see *Abdul v Safya* 35 C 764 *Nanchand v Yenawa*, 28 B 630

(t) *Umesh v Malthura* 28 C. 246 5 C. W N 607

is it necessary where the plaintiff in strictness is entitled to a decree for the land itself, and it is only by his consent that money has been awarded in lieu of the land (a) nor where the plaintiff is suing for redemption, i.e. is trying to pay a debt and not to recover it (b)

18 Sub section (2) Land used etc The words 'land used for agricultural purposes govern the words 'rent, revenue or profits It is only in respect of rent, revenue or profits payable in respect of land used for agricultural purposes that a succession certificate is not necessary (c)

A suit to recover the value of paddy of a deceased landlord is not a claim in respect of a 'debt' within the meaning of this section (d)

215. (P 152. S. C. 21) (1) A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or under the Succession Certificate Act, 1889, or Bombay Regulation No VIII of 1827, in respect of any debts or securities included in the estate

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration

Change The words 'in respect of any debts or securities included in the estate' have been substituted for the words 'in respect of the same property'

This clause is intended to reproduce the effect of sec 152 of the Probate and Administration Act and sec 21 of the Succession Certificate Act and appears to come in appropriately under this Part of the Bill since it deals with the substitution of the title of the grantee for that of the certificate holder Notes on Clauses

Sub-section (2) It states that the person who has obtained probate or letters of administration may apply to be substituted in the place of the holder

(a) *Anugam v Valara* 24 M 22
(case of usufructuary mortgage)
(b) *Zafar Ali v Farli Pakash* 119
I C 99 *Kasurati v Motilal* 49 A
1 96 I C 478

(c) *Sahabjan v Abdul* 41 I C 84
Nasenda v Saladal 26 C. 536
3 C. W. N. 294 *Mohoda v*
Nunda 27 C 556 4 C W N 669
(d) *Va Hla v Meung* 75 I C 237

of a certificate in any suit instituted by the latter and pending at the time for the recovery of any debt or security.

The proviso It is intended to protect the interests of debtors who have, in ignorance of the grant of probate or of letters of administration, made payments to the holder of the certificate.

216. (S 260 P. 82) After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

2. The section. The preceding section deals with the rights of grantees in connection with proceedings pending in Court. This section declares that the executor or administrator after the grant is the only person entitled to institute a suit. It is the natural corollary of S. 211. The effect of the provisions of these two sections is that an executor or administrator by virtue of his office, or, in other words, in the character merely of executor or administrator, takes an estate in the property of the deceased and the legal character is vested in him. The property vests in the legatee also which enables him to deal with it. But it vests in the executor (or administrator) for administration purposes and he alone is competent to maintain an action to recover a debt due primarily to the estate of the deceased (a). The powers of an executor to the estate of a Hindu, etc., are more extensive than those of the administrator. The provisions of the Probate and Administration Act override any rules of Muhammadan law that are inconsistent with them and an administrator under this section is the only person clothed with authority to act as representative of the estate and to bind the estate of the heirs (b).

3. Power to sue. After the grant, the executor or administrator is the person who can sue or prosecute any suit with respect to matters arising out of the estate of the deceased and with respect to actions relating to debts which accrued due before or after the death of the testator. The Court will not allow the rights of an executor to be restricted by a party by means of a compromise entered into by them (c). Where an executrix dies before fully administering the estate, the deceased testator's son is not entitled to sue in respect of debts due to the deceased without taking administration *de bonis non* as the estate vests in the executrix and the son does not represent the estate (d). But a suit lies at the instance of a person not claiming in the capacity of a representative of the deceased (e). A stranger in possession of the estate of the joint debtor, as he was

(a) *Kaloo v Bibee Ramzo*, 69 I. C. 350; 2 Pat. L. T. 305. See S. 213 note.
(b) *Ramdhan v Sharfuddin*, 34 I. C.

128.
(c) *Sakli v Ram*, 55 I. C. 504.
(d) *Narasimulu v Gulam*, 16 M. 71.
(e) *Rajani v Afakhan*, 15 I. C. 542.

not the legal representative of the deceased, under the law as it stood then could not be proceeded against in execution or otherwise than by a regular suit (a) but the law has been changed (b) In a suit by a creditor against the estate of a deceased debtor, who has died leaving a will his heirs on intestacy do not represent his estate, and the suit is bad unless the estate is represented (c), but where the heir is sued not as legal representative of the deceased debtor a decree may be passed against him (d) An executor by his acts in that capacity can bind the estate of the testator under certain circumstances with liabilities created by him (executor) (e) Whether an executor can enter into a compromise with his co executor has been stated to be not free from doubt (f)

4 Representative The word is defined in S 2 (11) of the Civil Procedure Code and now includes 'any person who intermeddles with the estate of the deceased (g) The primary meaning of the words 'legal representative is the administrator or executor but according to the context it may mean the heir, the reversioner or any person who takes possession of the estate of the deceased including an executor *de son tort* (h) Pending a grant of administration the estate is represented by the heir or the universal or residuary legatee who is entitled to letters of administration (i)

5 Proof of executor's title The executor to prove his title must file not merely a copy of the grant but also a copy of the will attached to the grant which with the grant forms the probate (j)

6 Executor who has not joined in probate A power to sue or act in a representative character vests in the executor who has obtained probate An executor who has renounced or is unable to act cannot sue or act under this section (l) It has been observed that where the Hindu Wills Act did not apply it was not incumbent on the executor to obtain probate before acting as representative of the deceased (S 213) It must be pointed out, however that the Probate and Administration Act which included this section did not say that the section in that Act corresponding to this section was to apply only to cases governed by the Hindu Wills Act (l)

7 Bombay Regulation VIII of 1827 An administrator appointed under S 10 of this Regulation is merely the custodian of the property of the deceased until the rightful owner appears By his appointment he does not become a representative of the deceased person and he cannot therefore continue legal proceedings (m) but in a subsequent case (n) it has been held that so long as the status of such an administrator lasted no one else can represent the estate

(a) *Chathakelan v Goindra* 17 M 186

(b) See S 2 (11) C P C. def of legal representative See below n 4

(c) *Malanpini v Clooney* 22 C 703
Delaney v Rahamat 32 C 710

(d) *Akbarum v Kuttli Haji* 20 M 446

(e) *Sa'ya v Mollal* 27 C. 683 689

(f) *Chitambar v Krishnasami* 39 M 365 28 C 221
See also S 50 For the meaning of

the word under the Code of 1882 see *Chathakelan v Goindra* 17 M 186

(h) *Dinamont v Elahajul* 8 C W N 843

(i) *Chunt v Osmond* 30 C 1044

(j) *Delaney v Rahamat* 32 C 710
See O 7, 4 C P C

(l) *Satyaprasad v Mollal* 27 C. 683

(l) See *Chitambar v Krishnasami* 39 M 365 373 369

(m) *Malaya v Dett* 21 B 102

(n) *Ali Ibrahim v Ziaunissa* 12 B 150

PART IX.

Probate, Letters of Administration and Administration
of Assets of Deceased.

"The provisions of the Indian law regarding the grant of probate and administration of the assets of a deceased person are to be found in the Indian Succession Act, 1865, and the Probate and Administration Act. Those sections of the Succession Act which deal with representative title have already been disposed of by the preceding Part of the Bill and with these exceptions the provisions of the two Acts on the subject are with comparatively small differences identical. This Part of the Bill therefore provides in general terms for the administration of the assets of deceased persons of all classes covered by the two Acts in question and provides in its separate clauses such special exceptions which are necessitated in order that the existing law may be reproduced." Notes on Clauses.

217. (S. 2. P 2, 150) Save as otherwise provided by

Application of this Act or by any other law for the time
Part. being in force, all grants of probate and
letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.

Change—See the sections mentioned above.

CHAPTER I.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

The provisions of this Chapter have been rearranged in the following order :
(i) administration in case of intestacy, (ii) probate, (iii) letters of administration.

218. (1) (P. 23). If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to

To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person

the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them

(3) When no such person applies, it may be granted to a creditor of the deceased

1 **Change** The words and was a Hindu, & exempted person did not occur in S 23 of the Probate and Administration Act

2 **The section** Under this section a right to the grant of administration follows the right of succession and in order to establish the right the petitioner must show that he is as an heir entitled to a share in the distribution of the estate of the intestate (a) The section contemplates a grant of the whole estate and not of a portion as that would lead to great inconvenience but under certain circumstances partial grants may be made under S 255 Letters of administration should be granted under this section only in case of intestacy (b) In respect of coparcenary property under Mitakshara law there can not be any such thing as intestacy and it follows that a member of such a joint undivided family is not entitled to administration to the estate of a deceased member (c) A coparcener also cannot make a will of his undivided share in a joint Hindu family (d) unless he is the sole surviving coparcener (e) Letters of administration may be granted in respect of *debutter* property in certain events (f) but a contrary view has also been indicated (g) It is the duty of the Court in granting letters of administration to consider whether there is any estate to be administered and what assets are likely to come into the hands of the petitioner (h)

The Court will refuse to grant letters of administration where the deceased has left no debts or where the estate has in fact, been administered or where the immovable properties are too small and for their administration *e.g.* for collection of rents *etc.* letters are not necessary (i) or where the deceased has left no property (except a house) and there are no debts (and the dispute about the house can only be settled by a regular suit) (j) or where the application is made with an ulterior motive, i.e. not to administer the estate but to obtain a declaration of heirship so as to fortify the claim to succession (k)

The section shows that in the first instance the grant is to be made to one person, but the Court has a discretion under Sub section (2) to make a grant in

- (a) *Rajasam v Fakuruddin* 58 M L J 210 122 I C 504
 (b) *Mohim v Sarajubala*, 9 C L J 576
 (c) *Gopalaswamy v Meenakshi* 7 Rang 39 115 I C 905 *Ramagiri v Gocindammah* 82 I C 824 *Kali v Manabali* 70 I C 155
 (d) *Ramagiri v Gocindammah* 82 I C 824
 (e) *Re Desu Chetty* 33 M 93
 (f) *Ranjit v Jagannath* 12 C 375
 (g) *Lal v Jaga Mohan* 16 C W

- N 798
 (h) *Adwall v Krishnadhone* 21 C W N 1129, see *Lall v Balkuntha* 14 C W N 463 51 C 395
 (i) *Lakshmi v Nilayananda* 64 I C 61 see *Parasana v Hail* 17 C L J 65 16 I C 589
 (j) *Budhu v Ram* 42 I C 737 96 P L R 1917
 (k) *Lall v Balkuntha* 15 C L J 305 51 C 395 *Parasana v Hail* 17 C L J 65 16 I C 588

favour of one or more of the persons entitled The Court, however, at all times prefers a sole administrator to joint administrators (a) The Court cannot associate with a person entitled to the grant another who has no present interest in the estate (b)

3 Rules of distribution This expression is not a happy one It is borrowed from English law where rules which go by this name regulate the succession to the personal effects of an intestate deceased Here similar rules are known as rules of succession or of inheritance and they regulate the succession to properties, movable and immovable, of the deceased The person entitled to letters of administration is one who, according to the rules for the distribution of the estate applicable in case of such deceased, would be entitled to the whole or any part of such deceased's estate The surviving members of a joint Hindu family cannot be said to be so entitled because the estate passes to the survivors on death of the deceased and there is no such thing as succession (c)

4 Rules regulating grants The governing principle acted upon for many centuries in the Ecclesiastical Courts in England, and thereafter in the Court of Probate and adopted in our Probate and Administration Act, is that the right of administration follows the right to the property It is a good general rule to grant administration to the largest interest, and this rule ought not to be departed from except under urgent necessity for the protection and preservation of the estate (d)

Under this section letters of administration should be granted to such person who according to the rules for the distribution of the estate of an intestate would be entitled to the whole or any part of the estate, but it is open to the Court to refuse the application of such a person upon sufficient grounds In an application for a grant, it is to be first decided whether the deceased has left any estate at all and it does not matter what the estate is so long as there are any assets Next whether the applicant is the person who, according to the rules for the distribution of the estate applicable in case of such deceased, is the person entitled to the whole or any part of the deceased's estate (e) The Court will grant administration to the persons entitled to representation in case of intestacy, notwithstanding it is suggested that a document purporting to be a will exists, if the alleged executor and persons interested under it have been cited to propound it and have not appeared to the citation (f) It follows that in each case the Probate Court will have to determine the law of succession applicable in case of the deceased and whether under such law the applicant is entitled to the whole or any part of such deceased's estate Letters of administration have been granted to the preceptor or preceptor of the deceased, it being established that according to

- (a) *Re Yeshantibai*, 31 Bom L. R. 999, *Nitya v Kedar* 5 C L R. 369
 (b) *Annapurna v Kallavani*, 21 C 164
 (c) *Gopalaswamy v Meenakshi*, 7 Rang 39
 (d) *Bakul Bhagwati v Bahana* 57 I C 583 585

- (e) *Kali v Nitya*, 14 C W N 221, 7 I C. 1 see *Mohan v Kishen*, 21 C. 344, *Re Nursing*, 3 C. W. N 635
 (f) *Tr & C. 108* citing *Perry v Dyke*, 1 Sw & Tr 82; *Morton v Thorpe* 3 Sw & Tr 180

the custom prevailing in the sect he was entitled to the property of the deceased (a) A widow is entitled to administration prima facie in preference to a reversioner whose interest is contingent (b) A wife living apart from her husband is entitled to claim, on his death, administration to his estate preferably to his grandson (c).

A person not claiming any property of the testator but disputing his right to deal with certain property as his own has not such an interest in the estate of the deceased as will entitle him to oppose a grant of probate (d), similarly in case of letters of administration (e). Where the status of one of the applicants for letters was disputed but the other applicant was entitled to a part of the property of the deceased, *held*, letters should have been granted to the latter (f). Letters of administration may be granted to a creditor although the liabilities of the deceased debtor exceed the assets left by him Application in the Insolvency Court is not the only remedy open to the creditor (g) Failing all others, the Court may make a grant in favour of the first applicant who happens to be a next of kin or a residuary legatee (h)

5 Discretion. The main object of the grant being the protection and benefit of the estate, the Court has a discretion to refuse the grant to a person having the largest interest if it considers that in his hands the estate will suffer irretrievable loss and damage The Court has no discretion to refuse the grant to a person having the largest interest in the estate merely on the ground that it would be more satisfactory to make the grant to another person (i) The Court may make a grant (S 254) to one who has no present interest in the estate of the deceased but due weight should be given to the claim of the person who is entitled under this section (j) An order for letters of administration to the Administrator General can only be made on the application of that official or of one of the parties concerned (k).

6 Prostitutes In the absence of nearer heirs the brother's son of a Hindu woman who has adopted the life of a prostitute is her heir under the Dayabhaga law (l) Where evidence has been given that a particular woman is degraded opportunity of cross-examining these witnesses should be given to the person against whom this testimony is going to be used, as it is the right of every litigant in a suit, unless he waives it, to have an opportunity of cross-examination (m)

(a) *Collector of Dacca v Jagat*, 28 C 608, 5 C. W. N 873

(b) *Lakshmi v Nityananda* 64 I C 61

(c) *Maung Maung v Ma Hla*, 75 I C 206, 2 Bur. L. J 58

(d) *Aliram v Gopal* 17 C 49

(e) *Ramagiri v Gocindammah* 82 I C 824, *Gopalaswamy v Meenalshi*, 7 Rang 39

(f) *Ma Thu v Ma Ngwe*, 56 I C 764, *Shwe v Ma On* 45 I C 935

(g) *Re Mahan* 15 C. W. N 350

(h) *Corbett v Trailer*, 4 Sw & Tr 48
Re Mehta, 5 C. W. N 2311

(i) *Babul Bhagwall v Bahula* 57 I C. 583 585

(j) *Lakshmi v Nityananda* 64 I C 61

(k) *Ma Pwa v Yu Lwal* 34 I C 99
See Adm Genl's Act (III of 1913)

(l) *Hiralal v Tripura* 40 C 630, 17 C. W. N 679 (F B) *Narain v Jinal* 29 A 4, *Subbataja v Ramasami* 23 M. 171 For rulings to the contrary see *Sarnamajee v S of S for India* 25 C 254, 2 C. W. N 97, *Sundari v Nemye* 6 C L J 372

(m) *Chetoo v Rajaram* 11 C L J 124

7 Title The question of title of the testator to any property or that of his power to dispose of the same is not a matter which can be dealt with by the Probate Court (a) Of course the grant will not entitle an administrator or executor to hold any property to which the deceased was not entitled But the Probate Court must settle the dispute whether the petitioner for grant of letters of administration is the nearest heir (b) In order to decide the question it may be necessary for a Probate Court to go into questions of title Such decision will not be *res judicata* in a subsequent suit for title (c) Probate Court may have to decide the question of the validity of an adoption (d) A Hindu widow governed by the Mitakshara law is entitled to obtain letters of administration on the allegation that her husband has left separate property The Probate Court cannot go into the question whether the property left is joint or separate (e) or *joutaka stridhan* or not (f) Where there is a dispute as to the ownership of or succession to property it should be decided by a regular suit and letters of administration should not be granted (g) Thus where a grant is opposed by a person on the basis of a paramount title such as that he was joint with the deceased and so inherited the property by survivorship the Probate Court has no jurisdiction to go into that question (h)

219 (S. 200) If the deceased has died intestate and was

Where deceased is
not a Hindu Muham-
madan Buddhist
Sikh Jaina or ex-
empted person

not a person belonging to any of the classes referred to in section 218, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated, namely —

(S 201) (a) If the deceased has left a widow, administration shall be granted to the widow, unless the Court sees cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased

Illustrations

(i) The widow is a lunatic or has committed adultery or has been barred by her marriage settlement of all interest in her husband's estate There is cause for excluding her from the administration.

- (a) *Behari Lal v Ganga Dal* 41 I C. 279 *Shombhagayammal v Komalangi* 107 I C. 420
(b) *Kali v Nitya* 14 C. W N ecl 1 7 I C 1 *Nishi v Ashutosh* 17 C W N 613 23 I C. 296 *Sashi v Rajendra* 40 C. 82 *Man Singh v Santli* 50 I C. 964 *Debendra v Surendra* 54 I C. 807 *Abdul v Jayarbai* 31 Bom L. R. 1093, *Re Balmukund* 126 I C 357
(c) *Maung Tun v Ma Sein* 68 I C. 671

- (d) *Mahasunder v Ram Ratan* 35 I C. 416 1 Pat L. W 370 *Aung Ma v Ma Ah* 45 I C. 737 11 Bur L R 65 *Nga Ba v Nga Po* 33 I C 659
(e) *Raghu v Pate* 6 C. W N 345 *Raghubar v Bahadoor Hazam* 3 C W N cclxxvii fold
(f) *Nishi v Ashutosh* 17 C W N 613
(g) *Man Singh v Santli* 50 I C. 964
(h) *Debendra v Surendra* 54 I C. 807 *Ochacaram v Dolatram* 28 B 644 6 Bom L. R. 966 fold in Mohun v Kishan 21 C 344

(ii) The widow has married again since the decease of her husband This is not good cause for her exclusion

(S 201) (b) If the Judge thinks proper, he may associate any person or persons with the widow in the administration who would be entitled solely to the administration if there were no widow.

(S 203) (c) If there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration

(S. 204) (d) Those who stand in equal degree of kindred to the deceased are equally entitled to administration

(S. 205) (e) The husband surviving his wife has the same right of administration of her estate as the widow has in respect of the estate of her husband

(S. 206) (f) When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration and willing to act, they may be granted to a creditor

(S 207) (g) Where the deceased has left property in British India, letters of administration shall be granted according to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to testate and intestate succession differs from the law of British India

1 Change The words of the section If the deceased has died 218 have been substituted for the words when the deceased has died intestate and the word namely — has been added at the end of the first paragraph In clause (g) the word 'must' has been changed to shall, although to notwithstanding that and the words may have been a domiciled inhabitant of to had his domicile in

2 The section The section deals with the rights of relations connected by marriage or by blood to obtain letters of administration to the estate of a person who has died intestate and who was not a Hindu etc It is thus the counterpart of S 218 though there is a material difference between the two sections as regards the persons entitled to grants of letters of administration This section declares that the husband (cl e) or the wife (cl n) unless there is good cause for his or her exclusion (clause cl c) has the prior right next come the kindred of the deceased (cls c d) according to the nearness of their relation to the deceased

the mother of the deceased is entitled to preference (cl o) in the absence of the above relations letters of administration may be granted to a creditor (cl f) Finally it has been laid down that in every case where a deceased person leaves property in this country letters of administration should be granted according to the foregoing rules irrespective of the domicile of the deceased Where there is no next of kin or creditor the Court can grant administration to anybody it pleases (a) In such a case a limited grant may be made *ad colligenda bona* (b)

3 Clause (a) The Act gives the widow a priority of right to obtain letters of administration In England she has the same right as the next of kin (c), but in practice she is granted administration in preference to the next of kin unless there is some good cause to exclude her (d) A widow on remarriage does not become disentitled to letters of administration to her husband's property (e) A second wife is also entitled to the grant (f) If the widow die without taking administration the next of kin of the husband are entitled in priority to the widow's representative unless she becomes entitled to whole of her husband's estate (g) But a next of kin with a disputed claim against the estate is not favoured by the Court (h) The word adultery has not the limited meaning given to it in the Penal Code but means sexual intercourse of a married person with a person of the other sex whether married or unmarried (i)

4 Grounds of widow's exclusion (1) Where she lived separate from her husband (j) (2) where she had misconducted herself (l) the widow ought to be cited (k) but this is not necessary in all cases (m) (3) where she has been barred of all interest in her husband's property (n), (4) where she was of unsound mind (o)

5 Clause (b) It is in the discretion of the Court whether the widow should be granted sole administration or where several claim as next of kin whether anyone or more of them should be associated with her (p) The Court prefers a sole to a joint administration (q) Therefore an order for joint administration will not be made unless the next of kin are adult (or at any rate not of tender years) and consent (r) but this clause leaves the matter to the discretion of the judge alone In England a joint grant to a widow and the person entitled in distribution but who is not a next of kin of the husband has been refused (s) A creditor cannot

- (a) *Re Mayer* 3 P & D 39 (receiver),
Re Jackson 1892 P 257 (stranger)
Re Moor 1892 P 145
 (b) *Re Bolton* 1899 P 186, *Re*
Heerman 1910 P 357
 (c) *Re Corner* 31 L J P 170
 (d) *Re Poole* 1919 P 10 *Re Corner*
 31 L J P 170, *Re Richards* 2
 P & D 216. W 282 12 Ed.
 see illust. (i) for grounds of exclusion.
 (e) *Hobb v Needham* 1 Add 494
 (f) *Pyan v Ryan* 2 Phil 332
 (g) *Re Bryant* 1896 P 159
 (h) *Hobb v Needham* 1 Add 494
 (i) *Gnanamant v Erumanan*, 110 I C.
 439
 (j) *Lambell v Lambell* 3 Hagg 56ⁿ
 but see *Re Ilcr* 3 P & D 50

- (k) *Re Anderson*, 3 Sw & Tr 489
 See W 282 12 Ed
 (l) *Re Middleton* 14 P D 123
 (m) *Re Steens* 1893 P 126
 (n) *Walker v Carless* 2 Lee 560
 see *Re Cosnahan* 1 P & D 183
 (o) *Re Dunn* 5 No of Cas 97 W.
 283 12 Ed.
 (p) *Re Morgan* (1920) 1 Ch. 196
 (q) *Wardick v Greville* 1 Phil 123,
Re Yesharar bat, 31 Bom L R
 999 *Allye v Acliar* 5 C. L R.
 358.
 (r) *Re Newbold* 1 P & D 235,
Re Dickinson 1891 P 292.
 (s) *Re Browning* 2 Sw & Tr 634,
 see *Re Thacker* 1900 P 15

be associated with the widow (a) nor a person who has no present interest in the estate (b)

6 Clauses (c and d) As the grant follows the interest the right to administration is determined according to the nearness of kindred to the intestate those standing in equal degree are equally entitled Males have no preference over females (c), full blood has no preference over half blood (d), primogeniture does not give any preference to the eldest son (e), relations by the father's side and the mother's side stand in equal degree of kindred and are equally entitled (f) But descendants have a preference over ascendants, therefore among those standing in the same degree of kindred, children (g) and their lineal descendants to the remotest degree (h), have preference over parents, so have brothers and sisters over grandparents (i)

7 Grounds of selection Where there are several persons standing in the same degree of kindred, administration is granted to the person most competent to manage the estate, 'the primary object being the interest of the estate (j) Where a selection cannot be made on this ground the Court entrusts the administration to those among the same degree of kindred to whom the majority of the parties interested are desirous of entrusting the estate (k), but not always (l) This rule namely, grant of administration to majority of interests, is not applied in case of a contest between relations of the full blood and of the half blood, the full blood gets the preference (m) Similarly where all other considerations are absolutely equal, a preference has been shown to the eldest son (n), to a man accustomed to business (o), to a son over a daughter (p) Where none of those considerations applies the Court will grant the letters of administration to the first applicant (q) Where a relation of the same degree as the applicant does not apply for letters of administration the Court will require proof of service of notice of the application on the former, but the Court may dispense with it where the estate is a small one and the next of kin has not been heard of for many many years (r) Even where a person entitled to administration is resident in a foreign country notice of the application must be served on him with due diligence (s)

The special case of the mother is due probably to the English rule that on the death of the child intestate without a wife, child or father, the mother is entitled to administration and before the statute Jac II c 17 she could claim as next of

- (a) *Stretch v Pynn* 1 Lee 30 W 282 12 Ed
- (b) *Annapurna v Kallayant* 21 C 164 (decision under S 218)
- (c) *Brown v Wood A'eyn* 36
- (d) *Smith v Tracey* 1 Vent 323
- (e) *Warwick v Greville* 1 Phill 123
- (f) *Atcor v Barham* cited in *Blackborough v Davis*, 1 P. W 41, 53
- (g) *Wlthy v Mangles* 4 Bear 358 on app. 10 Cl & F 215
- (h) *Leelyn v Feelyn* Amb 192
- (i) *Leelyn v Feelyn* 3 Ark 762. W 246 W 12 Ed
- (j) *Warwick v Greville* 1 Phill 123

- (k) *Budd v Silver* 2 Phill 115 1n
- (l) *Weddrill v Wright* 2 Phill 243, *Re Stainton* 2 P & D 212 W 289 12 Ed
- (m) *Stratton v Linlon* 31 L. J. P. & M 48
- (n) *Warwick v Greville* 1 Phill 123, *Copplin v Dillon* 4 Hag 376 (eldest of two sisters was granted the letters)
- (o) *Williams v Wilkins* 2 Phill 100
- (p) *Chittenden v Wright* 2 Lee 559 W 290 12 Ed
- (q) *Cordeux v Trasler* 4 Sw & Tr 49
- (r) *Re Harper*, 1899 P 59
- (s) *Goddard v Cressonier* 3 Phill 637

kin the entire personal estate but by that statute every brother and sister of the deceased has been given an equal share with the mother (a).

8 Clause (c) Right of husband The husband has a paramount right of administration over his wife's estate on her death intestate (b) If the husband die without administering the wife's estate fully or at all, his next of kin will be entitled to administration or administration *de bonis non* on the principle that the grant follows the interest (c) Where the husband and wife die together, administration will be granted to their respective next of kin (d) There is no presumption as regards the death of the one before the other (e) 'Upon the bankruptcy of the husband his right to administer his wife's estate is not such a right as will vest in the trustee under his bankruptcy, but under special circumstances the Court will grant administration to the trustee (f)

9 Grounds of husband's exclusion The husband loses his right if (i) he does not appear on citation (g) (ii) or if the marriage has been dissolved by reason of his adultery and desertion (h) (iii) or if the marriage be void (i) Civil disabilities e.g., a prior marriage, want of age, idiocy make the marriage void Canonical disabilities (such as marriage within prohibited degrees) or corporeal infirmities make the marriage voidable unless declared void during the lifetime of parties and unless so declared the husband retains his right of administration (j), (iv) or if the husband has deserted his wife and she has obtained a protection order, then in respect of property acquired after desertion (k), (v) or if a separation order has been made (l) (vi) or if the husband has covenanted with the wife that in case of her death intestate her next of kin will be entitled to administration (m), (vii) or if the husband is not entitled to any property left by his wife (n)

10 Clause (f) On the failure of the next of kin to take out administration it may be granted to a creditor (o) His bond includes a covenant to pay all debts of the deceased rateably and proportionately without showing any preference to his own debt Before a grant is made to him citation is issued to the next of kin and the heir to accept or refuse letters of administration or show cause why they should not be granted to the creditor (p), unless the estate be a small one when proof of notice of service of application to next of kin is enough (q) One creditor

- (a) W 226 12 Ed
(b) *Humphrey v Bullen* 1 Atk 458
Re Clark 15 P D 10, *Re Ashley* 15 P D 120
(c) *Re Crause* 1 Sw & Tr 146
(d) *Re Wheeler*, 31 L J P 40,
Re Benyon 1901 P 141 *Re Roby* 1913 P 6.
(e) *Wing v Angrave* 8 H L C 183
Walker 51 4
(f) W 278 12 Ed citing *Re Turner*
12 P D 18, *Re Causton* 1906
P 124, *Re Bourton* 84 L J
P 92
(g) *Re Moore* 1891 P 299
(h) *Re Hay* 1 P & D 51, *Re Wallas*
1905 P 326.

- (i) *Browning v Reane* 2 Phill 69
but see *Wilkinson v Gordon* 2 Add
152
(j) *Ellott v Gurr* 2 Phill 16
(k) *Re Warman* 1 Sw & Tr 513,
see *Re Brighton* 34 L J P &
M 55 W. 278 12 Ed
(l) *Re Jones* 74 L J P 27 (in respect
of property acquired since separation)
(m) *Allen v Humphrys* 8 P D 16
(n) *Re Probst* 16 L T 298 (wife's
next of kin will be entitled)
(o) *Webb v Needham* 1 Add 494
(p) *Re Keene*, 1 Sw & Tr 265
(q) *Re Teece* 1896 P 6 *Re Heerman*,
1910 P 357 W 314 12 Ed

before the grant (a) or sue a person who deals wrongfully with the property of the deceased before the grant (b), or can ratify a contract made by anybody on behalf of the intestate's estate (c), or can ratify a sale of the intestate's property (d) The estate has been held liable for services rendered before the grant at the request of an administrator before he had obtained the grant (e) A promise to pay a debt to a person assuming to act as administrator or who afterwards obtains a grant keeps the debt alive (f) In respect of real property which vests in the heir on the death of a person intestate upon administration being granted, the grant has the effect of vesting the land in the administrator by relation so as to enable him to bring action in respect of it subsequent to the death of intestate (g) "Where a party does an act professedly intending to take out letters of administration and afterwards becomes administrator, the administration has relation back, and gives effect to what he had done by anticipation (h) ' Though an administrator may after grant enforce a contract entered into before grant (i), he is not estopped in an action brought after grant from setting up his title as personal representative to defeat his own acts before grant (j)

A plaint is defective if it do not show that the plaintiff had obtained letters of administration, but if the letters be obtained before hearing it may be allowed to proceed and decree passed in the suit will be good (k) Even the Administrator General can not sue before obtaining probate that he has applied for a grant is not enough (l) An administrator who sues before grant must produce it when it becomes necessary to prove his title (m)

221. (S. 192 P 15) Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

Doctrine of relation back 'In as much as an administrator derives his title solely from the grant to him of letters of administration, one who acts as administrator before such grant is really an executor de son tort' (n) The nature of the acts done prior to a grant which are upheld by a grant subsequently made has been discussed in the notes to the last section This section states what acts are not validated by a subsequent grant The law is the same in England An act done by a party who afterwards becomes administrator, to the prejudice of the

- (a) *Tharpe v Stallwood* 5 M & Gr 760
 (b) *The King v Inhabitants &c* 8 East 405, *Re Prys* 1904 P 301, but see *Crossfield v Such* 8 Exch 825
 (c) *Bodger v Arch* 10 Exch 333
 (d) *Foster v Bates* 12 M & W 226
Morgan v Thomas 8 Exch. 302 W 274 5 12 Ed
 (e) *Re Watson* 18 Q B D 116 on app. 19 Q B D 234
 (f) *Bodger v Arch* 10 Exch 333, see *The Stamford &c v Smith* (1892) 1 Q B 765 769 but see *Raja Ram v Fakhud's* 53 M 480 122 I C 504
Re Prys 1904 P 301 cited in

- Charu v Nahush* 50 C 49 74 I C 630
 (h) *Morgan v Thomas* 8 Exch 302 306
 (i) *Foster v Bates* 12 M & W 226
 (j) H Vol 14 p 147 *Doe v Glenn* 1 Ad & El 49 *Stellers v Brown* 1 H & C 686 held to
 (k) *Sellna v Hemingway* 38 B 618
 (l) *Adm. Genl v Lall* 12 C W N 738
 (m) *Hunt v Steevens* 3 Taunt 113
Horne v Horner 23 L J Cl 10;
 see *Chetty v Chetty* 43 I A 113 (1916) 1 A C 603
 (n) *Walker* 178 See S 303

estate is not made good by the subsequent administration. It is only in those cases where the act is for the benefit of the estate that the relation back exists by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled" (a). Thus an administrator can only sue when the act done is for the benefit of the estate (b) or in due course of administration (c). An acknowledgment of a barred debt made prior to obtaining letters of administration is an act tending to the diminution of the intestate's estate and therefore is not made effectual by the subsequent grant unless the grant was to the heir of the deceased (d).

Distinction between the effect of probate and of letters. The distinction between the effect of a grant of probate and a grant of letters of administration is clearly shown by reference to sections 220, 221, 227. While the probate of a will renders valid all intermediate acts of the executor as such, letters of administration do not render valid any intermediate act of the administrator tending to the diminution or damage of the intestate's estate as effectually as if the administration had been granted at the moment after his death. In *Hiatu v Debendra* (e) a mortgage executed by the heirs of a deceased intestate prior to grant of administration was held not binding on the intestate's estate but see *Gonzales v. Makis* (f).

222. (S. 181. P. 6) (1) Probate shall be granted
 Probate only to only to an executor appointed by the
 appointed executor will

(S. 182. P. 7) (2) The appointment may be expressed or by necessary implication.

Illustrations

(i) A wills that C be his executor if B will not. B is appointed executor by implication.

(ii) A gives a legacy to B and several legacies to other persons, among the rest to his daughter in law C, and adds "but should the within named C be not living I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.

(iii) A appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates." The nephew is appointed an executor by implication.

(a) *Morgan v Thomas* 8 Exch. 302, 307, see *Hiatu v Debendra* 29 C. L. J. 58, 49 I C 532.

(b) *Morgan v Thomas* 8 Exch. 302.

(c) *Hill v Curtis* 1 Eq. 90, 100. *Ellis v Ellis*, (1905) 1 Ch. 613. See *Crasler v Thomas* (1909) 2 Ch. 342. W. 402, 12 Ed.

(d) *Raja Rama v Fakrudin*, 53 M.

480, 122 I C. 504, but see S. 220 note (). An executor may make a binding promise to pay a barred debt, *Ibid*, *Pestonji v Bai Meherbai* 30 Bom. L. R. 1407, 112 I C. 740.

(e) 29 C. L. J. 58, 49 I C 532.

(f) 34 M. 395.

Sub section (1) It states that probate is to be granted to an executor appointed by the will. The implication is that probate is to be granted of a testamentary instrument only.

1 Probate to be granted of what A document to be admitted to probate must have a testamentary character (a) *Prima facie* every document purporting to be testamentary, and signed and witnessed in accordance with the provisions of this Act ought to be admitted to probate (b) A document referring to succession to the writer's entire property on his death has been held to be a will (c) The form is not of importance but it must comply with statutory requirements. Whatever be the form of a duly executed instrument if the person executing it intends that it shall not take effect until after his death it is testamentary (d) Thus where a person by some writing or memorandum revoked all prior testamentary instruments the Court ordered administration to issue with the memorandum annexed as that was a testamentary paper revoking all prior testamentary papers (e) Probate has been granted of wills executed in the form of deeds (i) when the intention of the writer of the paper was to convey benefits by the instrument which would be conveyed by it if it were considered as a will and (ii) death was the event which was to give effect to it (f) Extrinsic evidence is admissible to shew the intention with which an ambiguous paper has been executed (g) Then again a document not duly executed as a will may be incorporated by reference if the conditions of valid incorporation are complied with (h) A paper written between the date of the will and the date of codicil will be admitted to probate if the will read as speaking from the date of the execution of the codicil contain language which will incorporate the paper (i) But if the reference at the date of the codicil be to a future document then it will not be included in the probate (j) Documents in the form of letters (k) or of written answers to interrogatories (l) have been admitted to probate. Probate cannot be refused on the ground that the bequests contained in the will are illegal and void (m) or the executor is not a fit and proper person to be granted probate (n).

But in this country having regard to the definition of a will in S 2 (h) where property is not disposed of by the testator by an instrument it cannot be called a will. The mere fact that a manager (o) or a guardian (p) is appointed by a

- (a) *Van Staubensee v Atcock* 3 Sw Tr 6
 (b) See *Townsend v Moore* 1905 P 66
 (c) *Krishna Rao v Sundara Rao* 35 C W N 617 P C
 (d) *Cock v Cooke* 1 P & D 241
 (e) *Re Hubbard* 1 P & D 53 *Re Hicks* 1 P & D 683 see *Re Coles* 2 P & D 362 W 266
 (f) *Re Morgan* 1 P & D 214
Foundling Hospital v Crane (1911) 2 K B 367 *Maung Thu v U Thunanda* 5 Rang 571 *Balinay v Kishore* 15 C W N 1014 *Atines v Faden* 15 P D 105 *Uma Charan v Rakhai Das* 46 C L J 145
 (g) *Re Sinn* 15 P D 155 W 63 12 Ld.

- (h) See *Bai Gunnabal v Bhugwandus* 9 C W N 769 7 Bom L R 854 See S 64 and note
 (i) *Re Truro* 1 P & D 201
 (j) *Re Smart* 1902 P 238 W 56 57 12 Ed
 (k) *Re Manly* 3 Sw & Tr 56
Re Spratt 1897 P 28
 (l) *Green v Skipton* 1 Pl II 53 W 31 12 Ed
 (m) *Harnasji v Bal Dhanbaji* 12 B 164
 (n) *Haja Coomari v Doo ganoni* 21 C 195
 (o) *Chaitanya v Dajal* 9 C W N 1021
 (p) *Re Bakthawar* 23 M 133 see *Taachu n v Sushik* 11 A 166 17 C 122.

document is not of itself sufficient to bring the document within the meaning of a will and to render probate necessary nor is it necessary where the document is a mere statement (a) or provides for succession to shebaitis (b) In English law an instrument only nominating an executor and not disposing of any property is regarded as a will and is admitted to probate (c) In India an instrument which does not dispose of property has no testamentary effect (d)

2 Whole Instrument may not be admitted to probate Probate has been granted after striking out certain words which have been inserted without the testators knowledge (e) but the Court cannot even by consent order a passage of the will to be expunged which a testator of sound mind intended to form part of it (f) Where a clause in a will has been inserted through fraud or inadvertence it may be rejected and probate granted of the remainder that is of the part only that is good (g)

3 Probate of lost wills In respect of lost wills probate may be granted after proof of due execution and attestation of the instruments of the contents thereof or of so much thereof as may be proved by satisfactory evidence (h) Where a will is not forthcoming probate may be granted of a codicil which stands unrevoled (i) So also where the will is revoked but the codicil is not (j)

4 Probate of wills of foreigners In respect of persons domiciled abroad probate is granted of his will in England if it be valid under the law of the country of his domicile or has been recognised as valid by the Court of that country (k) An expert may be called to prove the foreign law (l) Where a will has been probated in a foreign court it is the practice of the English Courts to require the codicil to be probated there also (m)

The object of a grant is to enable the executor or administrator to administer property in the country where the grant is made Where therefore a testator disposes of properties in England and in a foreign country and makes two wills with two different executors the function of the Court is exhausted in

- (a) *Bhagaban v Raghunundun* 22 I A 94 105 22 C 843 857
 (b) *Chalanya v Dayal* 32 C 1082 9 C W N 1021 fold in *Balsnao v Kishore* 15 C W N 1014
 (c) *Brownrigg v Pike* 7 P D 61 *Re Jordan* 1 P & D 555 W 131 12 Ed
 (d) *Bhagaban v Ram* 22 C 843 857
 (e) *Allen v McPherson* 1 H L C 191, *Morrell v Morrell* 7 P D 68 see *Girish v Rashbehary* 1 C L J 169 S 61
 (f) *Balsnao v Kishore* 15 C W N 1014 W cited
 (g) *Trimelslow v D Alton* 1 Dow & Cl 85 *Rhodes v Rhodes* 7 A C 192 *Balsnao v Kishore* 15 C W N 1014

- (h) *Kedar v Sarojni*, 3 C W N 617, *Brown v Brown* 8 E & B 876 *Sugden v Lord St Leonards* 1 P D 154 *Woodward v Gauldstone* 11 A C 469 See S 237 sq W 97 sq 12 Ed
 (i) *Black v Jobling* 1 P & D 685
 (j) *Re Savage* 2 P & D 78 W 95 12 Ed
 (k) *Enghin v Wylie* 10 H L C 1 *Miller v James* 3 P & D 4 *Whicker v Hume* 7 H L C 124 *Bremer v Freeman* 10 Moo P C C 306 *Meyappa v Supramanian* 43 I A 113 35 I C 323
 (l) *Re Whitelegg* 1899 P 267 as to his qualification W 239 12 Ed
 (m) *Re Miller* 8 P D 167

Sub section (1) It states that probate is to be granted to an executor appointed by the will. The implication is that probate is to be granted of a testamentary instrument only.

1 Probate to be granted of what A document to be admitted to probate must have a testamentary character (a) *Prima facie* every document purporting to be testamentary, and signed and witnessed in accordance with the provisions of this Act ought to be admitted to probate (b) A document referring to succession to the writer's entire property on his death has been held to be a will (c) The form is not of importance, but it must comply with statutory requirements Whatever be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, it is testamentary (d) Thus where a person by some writing or memorandum revoked all prior testamentary instruments the Court ordered administration to issue with the memorandum annexed as that was a testamentary paper revoking all prior testamentary papers (e) Probate has been granted of wills executed in the form of deeds (i) when the intention of the writer of the paper was to convey benefits by the instrument which would be conveyed by it if it were considered as a will, and (ii) death was the event which was to give effect to it (f) Extrinsic evidence is admissible to shew the intention with which an ambiguous paper has been executed (g) Then again a document not duly executed as a will may be incorporated by reference, if the conditions of valid incorporation are complied with (h) A paper written between the date of the will and the date of codicil will be admitted to probate if the will read as speaking from the date of the execution of the codicil contain language which will incorporate the paper (i) But if the reference at the date of the codicil be to a future document then it will not be included in the probate (j) Documents in the form of letters (k) or of written answers to interrogatories (l) have been admitted to probate Probate cannot be refused on the ground that the bequests contained in the will are illegal and void (m) or the executor is not a fit and proper person to be granted probate (n)

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 (d) *Cock v Cooke* 1 P & D 241
 (e) *Re Hubbard* 1 P & D 53 *Re Hicks* 1 P & D 693 *see Re Coles*, 2 P & D 362 W 266
 (f) *Re Morgan* 1 P & D 214, *Foundling Hospital v Crane* (1911) 2 K B 367, *Maung Thu v U Thunanda* 5 Rang 571 *Balnash v Kishore* 15 C. W. N 1014 *Milnes v Foden* 15 P D 105 *Uma Charan v Rethal Das* 46 C. L. J 145
 (g) *Re Sinn* 15 P D 155 W 62 63 12 Ed

- (h) *See Bal Gungabal v Bhugwandus* 9 C W N 769 7 Bom L R 854 *See S 64 and note*
 (i) *Re Truro* 1 P & D 201
 (j) *Re Smart* 1902 P 238 W 56 57 12 Ed
 (k) *Re Manly* 3 Sw & Tr 56, *Re Sprall* 1897 P 28
 (l) *Green v Skipworth*, 1 Plill 53 W 31 12 Ed
 (m) *Homasji v Bal Dhanbaiji* 12 B 164
 (n) *Hara Coomar v Doorgamoni* 21 C 195
 (o) *Chaitanya v Dayal* 9 C. W. N 1021.
 (p) *Re Bakhtawar* 23 M 133 *see Tarachurn v Suresh* 16 I A 166; 17 C. 122.

document is not of itself sufficient to bring the document within the meaning of a will and to render probate necessary, nor is it necessary where the document is a mere statement (a) or provides for succession to shebais (b) In English law an instrument only nominating an executor and not disposing of any property is regarded as a will and is admitted to probate (c) In India an instrument which does not dispose of property has no testamentary effect (d)

2 Whole Instrument may not be admitted to probate Probate has been granted after striking out certain words which have been inserted without the testator's knowledge (e) but the Court cannot even by consent order a passage of the will to be expunged which a testator of sound mind intended to form part of it (f) Where a clause in a will has been inserted through fraud or inadvertence it may be rejected and probate granted of the remainder that is of the part only that is good (g)

3 Probate of lost wills In respect of lost wills probate may be granted after proof of due execution and attestation of the instruments of the contents thereof or of so much thereof as may be proved by satisfactory evidence (h) Where a will is not forthcoming probate may be granted of a codicil which stands unrevoked (i) So also where the will is revoked but the codicil is not (j)

4 Probate of wills of foreigners In respect of persons domiciled abroad probate is granted of his will in England if it be valid under the law of the country of his domicile or has been recognised as valid by the Court of that country (k) An expert may be called to prove the foreign law (l) Where a will has been probated in a foreign court it is the practice of the English Courts to require the codicil to be probated there also (m)

The object of a grant is to enable the executor or administrator to administer property in the country where the grant is made Where therefore a testator disposes of properties in England and in a foreign country and makes two wills with two different executors the function of the Court is exhausted in

- (a) *Bhagaban v Raghunundun* 22 I A 94 105 22 C. 843 857
 (b) *Chaitanya v Dayal* 32 C 1082 9 C W N 1021 fold in *Balsanao v Kishore* 15 C W N 1014
 (c) *Brownrigg v Pike* 7 P D 61 *Re Jordan* 1 P & D 555 W 131 12 Ed
 (d) *Bhagaban v Ram* 22 C 843 857
 (e) *Allen v McPherson* 1 H L C 191 *Morrell v Morrell* 7 P D 68 see *Gilsh v Rashbeha y* 1 C L J 169 S 61
 (f) *Balsanao v Kishore* 15 C W N 1014 W cited
 (g) *Trimelstown v D Allon* 1 Dow & Cl 85 *Rhodes v Rhodes* 7 A C 192 *Balsanao v Kishore* 15 C W N 1014

- (h) *Kedar v Sarojini* 3 C W N 617 *Bawn v Bawn* 8 E & B 876 *Sugden v Lord St Leonards* 1 P D 154 *Woodward v Gaultstone* 11 A C. 469 See S 237 sq W 97 sq 12 Ed
 (i) *Black v Jobling* 1 P & D 685
 (j) *Re Savage* 2 P & D 78 W 95 12 Ed
 (k) *Enohin v Wylie* 10 H L C 1 *Miller v James* 3 P & D 4 *Whicker v Hume* 7 H L C 124 *Bremer v Freeman* 10 Moo P C C 306 *Meyappa v Supa man an* 43 I A 113 35 I C 323
 (l) *Re Whitelegg* 1899 P 267 as to his qualifications W 239 12 Ed
 (m) *Re Miller* 8 P D 167

making a grant of property of the English will (a) Letters of administration may be refused where the deceased has left no property in the country where the application is made (b)

'Where a testator has made two wills, one dealing with his property in England and the other with property abroad, probate may be obtained of the former will upon an attested copy of the latter will annexed to an affidavit being filed (c) If the two wills are not independent but the one incorporates the other probate is granted of both wills as in fact constituting one will (d) Where it is the intention of the testator to keep the foreign and the English properties separate probate is issued of the English will alone (e)

5 **Probate of several wills** When there are more testamentary documents than one they may be admitted to probate as together constituting the last testament of the deceased provided the subsequent will does not expressly or by implication revoke the earlier one If they are partially inconsistent then the former will to the extent that it is inconsistent with latter one will be revoked (f) Where of two wills two different executors have been appointed probate is granted to all the executors (g)

6 **Privileged wills** Probate may be granted of a privileged will (h) and also of a nuncupative will of a Hindu (i) etc and of draft instructions where S 57 has no application (j)

7 **Procedure** No grant of probate can be made unless the will has been proved in accordance with the law and in as much as the grant of probate operates as a judgment *in rem* the Court must be satisfied that the will has been duly executed and attested (k) Liberty to amend an application for grant of administration with will annexed by converting it to an application for grant of probate may be acceded to

8 **Where probate will be refused** Probate cannot be refused simply because the will is inofficious : *i.e.* the natural objects of affection have been passed over (l) or because the testator had no power to dispose of some or all of the properties he has purported to dispose of (m) or on the ground of the executor's disputing the will (n) The reason is that the Court in granting probate

(a) *Re Coode* 1 P & D 449, *Re Murray* 1896 P 65 but see *Re Bolton* 12 P D 202 W 236 292 12 Ed

(b) *Re Tucker* 34 L J P 29

(c) *Re Astor* 1 P D 150 *Re D La Rue* 15 P D 185 *Re Fraser* 1891 P 225

(d) *Re Howden* 43 L J P 26 *Re De La Saussaye* 3 P & D 42, *Re Murray* 1896 P 65

(e) *Re Schenley* 29 L T R 127 11 Vol 14 p 165

(f) *Townsend v Moore* 1905 P 66 77 See S 225 note see *Shemal v Sheikh Ahmed* 33 Bom L R 1056

(g) *Lemaitre v Goodwin* 1 P & D 57 *Townsend v Moore* 1905 P 66 See S 225 note

(h) *Re Scott* 1903 P 243

(i) *Gokul v Mangal* 25 A 313 *Ra Haji Mahomed* 24 B 8, *Gokul das v Purshotamdas* 1 Bom L R 470 but see S 57 See *Venkal Rao v Namdeo* 29 A L J 1131 P C

(j) *Balmukund v Ramendra* 25 A L J 1073

(k) *Ameet Chand v Mohanund* 6 C L J 453 *Monmollini v Banga* 31 C 357 For procedure see S 264 sq

(l) *Rammol v Hakeel* 22 C W N 315 43 I C 209

(m) *Darot v Balmull* 18 B 747; *Isiq Hormusji v Bai Dhanabai* 12 B 164 *Beha v Ganga* 41 I C 279

(n) *Saralabala v Bhatyanath*, 32 C W N 729

will not concern itself with questions of title or validity of dispositions (a) The Court has no option but to grant probate It has discretion in the matter of a grant of letters of administration (b)

9 Executor entitled to probate The Act nowhere provides for any discretion (as is given to the Court under S 218 in the matter of the grant of letters of administration) being exercised in the case of an application for probate by an executor named in the will who is under no legal incapacity to act Moreover, a right to obtain probate is confined to the executor and can by no means devolve upon the heir of the executor, whereas, under Ss 232 and 233, the heir of a legatee, who is not a mere trustee but has an interest under the will, is a person entitled to apply for letters of administration (c) A person convicted of felony or attainted or outlawed may maintain a suit for establishing the validity of a will by which he is appointed executor (d) A universal legatee is entitled to letters of administration with the will annexed A grant of probate to him will be, from the first, invalid in law (e) The Court cannot refuse probate on the ground of insolvency of the executor (f) An executor is not disqualified on conviction of felony after the testator's death (g)

It is only the executor appointed by the will who can prove the will for obtaining probate (h) He may waive his own right but cannot transfer it to another (i) Probate may be granted to an executor nominated by the testator jointly with an executor according to the tenor (j) An executor may ask for probate at any time (k), even though there are no debts and the legatees have been in possession in accordance with the directions of the will for a long time (l)

10 Who may be appointed executors The following list is given in English text books (m) (i) the king in which case he appoints such persons as he thinks proper to officiate the execution of the will

(ii) Corporations aggregate in which case the Court grants letters of administration with the will annexed to a syndic (n) or to a nominee (o) appointed by the corporation

(iii) A partnership firm, in which case persons composing the firm will be entitled to probate (p)

(a) *Behari v Juggo* 4 C. 1 *Hotmussji v Bal Dharbajji* 12 B 164

(b) *Prian v Jado*, 20 A 189, *Thoppal v Gouinda*, 94 I C 73

(c) *Phekni v Manji*, 9 Pat 693

(d) *Hara v Doorgamoni*, 21 C. 195 citing *Smethurst v Tomlin* 30 L.J.P. 269, *Re Samson* 3 P & D 43, *Prian v Jado* 21 A 189

(e) *Prayag v Goukaran* 6 C. W. N 787, *Re Sloshce* 19 C. 592, *Exp Little Doss*, 15 M 350, *Re Radhika*, 7 B L. R 563 n. 101

(f) *Hills v Mills* 1 Salk 36 But see S 301

(g) *Smethurst v Tomlin*, 2 Sw & Tr 143 but see *Re Hall* 1914 P. 1

(h) *Wankford v Wankford* 1 Salk.

309, see *Pulikkut v Thappali*, 108 I C. 409, *Ambadas v Kashibai*, 71 I C. 979

(i) *Re AL Inerney* L. R. 11 5 Ch D 554

(j) *Behari Lal v Ganga* 41 I C 279

(k) *Sallabai v Baldyanath* 32 C. W. N 729

(l) *Adzall v Krishnadhone*, 31 C. W. N 1129

(m) W 132, 12 Ed., Walker 11, 10ppen 47

(n) *Re Drake* 1 Sw & Tr 516, *Re Rankine*, 1918 P. 134

(o) *Re Hunt*, 1896 P. 299

(p) *Re Fernie* 6 No. of Cal. . *Re Nash*, 29 C. W. N 1 C. 974

(iv) An alien (a)

(v) Infants even a child in the womb and if more than one be born they are all entitled to be executors Administration with the will annexed is granted in case of an infant being appointed sole executor to the guardian or to such person as the Court thinks fit until the infant attains majority (b) but not where there are other executors competent to act (c)

(vi) Persons attainted or outlawed They may sue as executors or administrators (d)

(vii) Insolvents and bad characters They cannot be refused probate and the Court has no authority to demand caution of such an executor when the testator himself required none (e) A Court of Chancery may restrain a bankrupt executor from acting and appoint a receiver (f) unless the insolvent was appointed as executor by the testator with full knowledge (g) but the Court will not exercise its power where the executor is simply in mean circumstances (h)

(viii) Idiots and lunatics They are incapable of being executors or administrators Mere weakness of mind is not sufficient to disqualify a person (i) If a sole executor be of unsound mind administration will be committed by the Court to another (j) If one of several executors becomes insane the grant will be revoked and a fresh grant made to the other executors power being reserved to the lunatic to come in and prove when capable (k)

The Administrator General cannot be appointed and cannot act as executor (l)

11 Restrictions on the executors powers In the absence of any restriction an executor enjoys the full power conferred on him by statute but the testator is at liberty to qualify the appointment by placing limitations on his powers (m) (i) Limitations as to time An executor may be directed to assume office or to cease to act after the lapse of a certain or uncertain period after the testator's death In such a case in the absence of any appointment by the testator administration with the will annexed may be granted to another person (n) Thus an executor's office has been held to last till a son to be taken in adoption attained majority (o) (ii) Limitations as to place The testator may appoint different executors for properties in different places (p) (iii) Limitations

- (a) *Caroon's Case* Cro Car 8
 (b) *Re Stewart* 3 P & D 244
 (c) *Forbist v Tremain* 1 Mod 47 See S 244 See W 342 sq
 (d) *Killigrew v Killigrew* 1 Vern 184
 (e) *Rex v Raines* 1 Lord Raym 361 see *Hills v Mills* 1 Salk 36
Re Samson 3 P & D 49 W 135 12 Ed
 (f) *Brown v Phillips* (1697) 1 Cl 174 *Re Ratcliff* (1893) 2 Cl 352 *Re Gunn* 9 P D 242. See S 301
 (g) *Langley v Hawke* 5 Madd 46
Stanley v Caon Co 18 Beav 146 161
Hathorn's Case v Russel 2 Atk

- 126 *Howard v Papera* 1 Madd 142
 (h) *Geans v Tyler* 2 Rob 128 W 136
 (j) *Hills v Mills* 1 Salk 36 *Geans v Tyler* 2 Rob 128 134
 (k) *Re Shaw* 1905 P 92
 (l) *Gey v Chawilla* 38 C 53 but see *Re Manicklal* 35 C 156; *Missa Juralulain v Peara Sahib* 37 I A 244
 (m) *The Eastern &c v Rebat* 3 C L J 260
 (n) W 147 sq
 (o) *Rafenda v Manick* 8 A L J 1063
 (p) *Re Gladstone* 1 C 169; *Re Hall* h 3 Sw & Tr 423 See ante

as to subject matter The testator may appoint different executors of different kinds of properties or there may be an executor for general and another for special purposes (a)

As against a creditor the limitations on the executor's powers are of no avail (b).

12. Conditional appointment. The appointment of an executor may be conditional, the condition may be a condition precedent, when the executor is not entitled to act before fulfilling the condition (c), or subsequent, when the executor's appointment is determined on the happening of some condition (d)

13 Sub section (2) This subsection "appears to be compiled almost *verbatim* from cases collected in the work of Mr (Sir Joshua) Williams on Executors as are many more sections of the Act framed upon cases decided in the English Courts This shows that the Indian Legislature thought that the Indian law of Succession might fitly be illustrated by English precedents (e) The executor holds his office by virtue of his appointment by will The appointment, as is stated in the section, may be express or by necessary implication.

Even an express appointment is not free from difficulties due to the use of ambiguous language in the will Thus an appointment may be void for uncertainty (f) The ambiguity may however be removed by admitting evidence of surrounding circumstances and of the sense in which a testator has used a particular word employed by him in the will (g) But oral declarations of the testator will probably be excluded (h) Where a person exists answering to the name and description given by the testator in his will, there is no ambiguity and therefore no extrinsic evidence is admissible (i) Thus where a testator appointed the Secretary of the Subarnabanik Samaj one of the 5 shebais appointed by the will, and the Samaj had 2 Secretaries, the appointment was held void for uncertainty (j)

14 Necessary implication An executor by necessary implication is also known as executor 'according to the tenor' The appointment of such an executor is not express but constructive It is a question of construction of each particular instrument Thus, where a testator by his will appointed A 'to hold and administer in trust all my estate, *held*, A was an executor according to the tenor (k) Lord Eldon has pointed out in *Wilkinson v Adam* (l)

- (a) *Re Parker's Trusts* (1894) 1 Ch. 707, *Sarada v Triguna* 46 I C 117
 (b) W 172 II Ed
 (c) *Re Wilmot* 1 Curt 1, see *Re Lane* 33 L. J P. 185
 (d) *Re Langford*, 1 P & D 458
 (e) *Hamabai v Bamanji*, 7 B H C R A C. J 64
 (f) *Re Bayls* 2 Sw & Tr 613, *Re Blackwell*, 2 P D 72, but see *Re Hubback* 92 L. T 665
 (g) *Grant v Grant*, 2 P & D 8
Re De Rosaz 2 P D 66
Cloak v Hammond 34 Ch. D 255, *Re Ashton*, 1892 P. 83, *Re Fish*,

- (1894) 2 Ch 83, *Re Cooper*, 1899 P 193
 (h) *Re Chappell* 1894 P 98
 (i) *Re Peel* 2 P & D 46, see *Merrill v Morton* 17 Ch D 386
 (j) *Adm. Genl v Kumar* 54 C. L. J 57
 (k) *Re Way* 1901 P 345
 (l) 1 V & B 422 426 Where on behalf of certain minors their mother was appointed executrix *held*, the minors were appointed executors by implication and entitled to probate on attaining majority, *Hari Chaitanya v Ramram*, 105 I C. 626.

that conjecture must not be taken for necessary implication, 'necessary implication means not natural necessity, but, so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. The question in each case is, do the provisions of the will confer upon the person, by necessary implication, the rights, powers and duties of an executor, if they do, the person, thus clothed with the essential functions of the office, is an executor under the Will according to the tenor. But executorship according to the tenor, will not be inferred where the will does not import that the person named shall collect the dues, pay the debts and legacies, and settle the estate like an executor. The mere designation to perform some trust, or to be the guardian of an infant legatee is not sufficient to show that the person who claims to be an executor is clothed with the rights and duties of the office. The test of constructive appointment may be found by considering whether the acts to be done or the powers to be exercised, are such as appertain to the office of an executor. the mere fact that a person is appointed a trustee or *shebait* does not may make him an executor under the will. Yet where the testator uses the word trustee or *shebait* and, at the same time imposes upon the person, duties involving the functions of an executor, there is a good appointment as executor by necessary implication' (a) If consent of a person be necessary before an alienation of property, that person is not constituted an executor by implication. The test in such cases is "whether the person in question is one to whom the execution of the last will of the testator is by his appointment confided", "unless the Courts can gather from the words of the will, that the person named is required to pay the debts of the deceased and generally to administer the estate, it will not grant probate to him as executor according to the tenor thereof (b) "But the office of executor cannot be inferred by conjecture" (c) A mere direction to pay debts is not essential (d) in fact, it is not enough (e) A direction to pay debts out of the whole estate and not out of a particular fund may however make one an executor according to the tenor (f) An executor may be nominated for general purposes and another held to be executor according to the tenor for limited purposes (g) When there is an express appointment, it is less probable that there will be also an indirect appointment (h)

Where a testator says "I will that during the minority of my son none shall deal with my estate except A, *hell*, A was an executor (i) A direction to a person to dispose of property makes him an executor according to the tenor (j)

- (a) *Amcer v Mohanund* 6 C. L. J 453, see *Pulikkut v Thappalli* 108 I C 469
 (b) *The Eastern &c v Reball*, 3 C. L. J 269, see *Re Adamson*, 3 P & D 253, *Re Lowry*, 3 P & D 157, *Re Lush*, 13 P. D. 20 *Hamatat v Bamanji*, 7 B H C R A C J 64, *Re Courjon* 25 C. 63
 (c) *Re Woods* 1 P & D 556
 (d) *Re M'Fane* 21 L R 111
 (e) *Kupparajammal v Arimant* 22 M 345 *Re Income* 3 Sw & T 562

- (f) *Re Cook*, 1902 P. 114, *Re Fibu* 1902 P 188, *Re Monolur* 5 C 756, *Promode v Krishna* 1 C. L. J 301, *Re Baylis* 1 P & D 21 *Re Adamson* 3 P & D 253, *Re Lush* 13 P D 20 *Kupparajammal v Arimant* 22 M 345, *Arumilli v Arumilli* 54 M 266
 (g) *Lynch v Bel'ew* 3 Phill 424
 (h) *Gunaman v Euradian* 110 I C 439
 (i) *Brightman v Kelghley* Cro Eliz 43 *Hamatat v Bamanji* 7 B H C R A C J 64
 (j) *Henfry v H* 11 C 29 *Re Stal* 1

The mere circumstance that property is left by will to trustees without words referring to them as executors would not prevent those persons being granted probate as executors according to the tenor, if among the duties to be discharged by them under the will there are included such duties as executors have to perform (a) A trustee "to carry out this will" (b) or "to carry out my wishes" (c) will be an executor according to the tenor. A *shebast* has been held to have been appointed executor of the will by necessary implication because of words in the will showing that he was to represent the estate (d) A direction in the will that A "is to discharge the debts due by me to the world" has been held to make A an executor by implication (e) Mere appointment of a guardian of an infant son of the testator does not make him an executor by implication (f).

Probate has been granted to the universal legatee as executor by necessary implication (g). As Lord Hardwicke has said (h), "A person named as universal heir in a will, in my opinion, would have a right to go to the Ecclesiastical Courts for probate" A sole residuary legatee has been held entitled to probate as executor according to the tenor (i).

A gift to a trustee for a specific purpose with direction to pay to the persons intended (j), or an appointment of a person as guardian of a child to be taken in adoption (k) does not constitute him an executor according to the tenor, as he can have no power generally to deal with estate The mere fact of a will being directed to a person does not make him such an executor (l).

It is well settled that the appointment of executors by implication is not to be favoured, and the language of the will is not to be strained for this purpose, but in doubtful cases, letters of administration with the will annexed ought to be granted (m).

15. Substituted executor A testator may appoint several executors in which case all are entitled to probate but he may qualify the appointment in such a manner that A will be his executor, if he will not or cannot act then B

- (a) *Appacooty v Muthu* 30 M 191, 16 M L J 553 *Re Lowry*, 3 P & D 157, *Harilal v Bai Mani*, 29 B 351 7 Bom L R 255, *Moosa Haji v Haji Abdul*, 5 Bom L R 639, *Muthubai v Canji*, 26 B 571
- (b) *Re Russell*, 1892 P 380
- (c) *Re Allam* 66 L. T. 382
- (d) *Kupamoyee v Mohim*, 10 C W N 232, see *Kali v Annada*, 15 C W N 1, *Ranjit v Jagannath*, 12 C 375, *Ameer v Mohanund*, 6 C L J 453, 457
- (e) *Vitaruma v Seshamma*, 60 M L J 264
- (f) *Seshamma v Chennappa*, 20 M 467 fold in *Gopal Dass v Budree* 33 C 657, 663
- (g) *Re Radhika*, 7 B L R 563, not fold in *Re Soshee*, 19 C 582,

- Re Baylis*, 1 P & D 21 fold to Such legatee is entitled to administration with the will annexed S 232 *Re Pryse* 1904 P 301
- (h) *Androzin v Poilblanc* 3 Atk. 301.
- (i) *Man Mohan v Puresh*, 22 W. R 174
- (j) *Re Punchard*, 2 P. & D 369, *Re Lowry*, 3 P & D 157, *Re Mackenzie*, 1909 P. 305 W. 141 12 Ed
- (k) *Seshamma v Chennappa*, 20 M 467, fold in *Gopal v Budree* 33 C 657, 663-4 10 C W N 662, *Harilal v Bai Mani*, 29 B 351, *Harubai v Bamanji*, 7 B H C R A. C. J 64 (guardian held to be executor)
- (l) *Re Amrita*, 5 C W N xxvii
- (m) *Ameer v Mohanund*, 6 C L J 453 See S 232.

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 (d) *Re M Kane* 21 L R Ir 1
 (e) *Kuppajammal v Ammani*, 22 M 345, *Re loomey* 3 Sw & Tr 562

- (f) *Re Cook*, 1902 P. 114, *Re Kirby* 1902 P 188, *Re Monolur* 5 C 756, *Promode v Krishna* 1 C L J 301, *Re Baylis* 1 P & D 21, *Re Adamson* 3 P & D 253, *Re Lush*, 13 P D 20, *Kuppajammal v Ammani* 22 M 345, *Arumilli v Arumilli* 54 M 266
 (g) *Lynch v Bellem* 3 Phill 424
 (h) *Gunaman v Sawadian* 110 I C 439
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- (a) *Appacooty v Muthu* 30 M 191
16 M L J 553 *Re Lowry* 3
P & D 157 *Hanlal v Bai*
Mani 29 B 351 7 Bom L R
255 *Moosa Haji v Haji Abdul*
5 Bom L R 639 *Muthu bai v*
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(b) *Re Russell* 1692 P 380
(c) *Re Allam* 66 L T 382
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232, see *Kali v Annada* 15 C
W N 1 *Ranjit v Jagannath* 12
C 375, *Ameer v Mohanund* 6 C
L J 453, 457
(e) *Vasarama v Seshamma* 60 M L
J 264
(f) *Seshamma v Chennappa* 20 M
467 fold in *Gopal Dass v Budree*
33 C 657 663
(g) *Re Radhika* 7 B L R 563 not
fold in *Re Sasee* 19 C 582,

- Re Baylis* 1 P & D 21 refd to
Such legatee is entitled to administra-
tion with the will annexed S 232 *Re*
Physe 1904 P 301
(h) *Androuin v Polblanc* 3 Ark 301
(i) *Mun Mohun v Puresh*, 22 W R
174
(j) *Re Punchard* 2 P & D 369,
Re Lowry, 3 P & D 157, *Re*
Mackenzie, 1909 P 305 W 141
12 Ed
(k) *Seshamma v Chennappa* 20 M 467
fold in *Gopal v Budree* 33 C
657, 663-4 10 C W N 662
Hanlal v Bai Mani, 29 B 351,
Hamabai v Bamanji, 7 B H C
R A C J 64 (guardian held to
be executor)
(l) *Re Amrita*, 5 C W N xcvi
(m) *Ameer v Mohanund*, 6 C L J
453 See S 232

will act, if B will not or cannot act, C will act, and so on. In such a case A is said to be instituted executor in the first degree, B is said to be substituted in the second degree, C to be substituted in the third degree, and so on (a). If an instituted executor accept office then, on his death, the substitutes are not entitled to probate, unless the substitution be intended to be made on the death of the instituted executor when the substituted executors can come in and apply for probate (b). Where a substituted executor was empowered to act in the absence of the instituted executor, absence was construed to mean inability to act when necessity for proving the will arose (c). Where a substituted executor was appointed in the event of the instituted executor declining or considering himself incapable of acting and the latter died in the lifetime of the executrix, the former was held entitled to probate (d). As has been said, 'The Court will not construe the words of a will in a technical spirit but will endeavour rather to carry out the real object of the testator' (e). Substitution of an executor does not make his appointment one for a limited purpose (f) and a limited probate cannot be granted to him (g).

16. Nomination of executor. Executors may be nominated by a person or persons named by the testator (h). Such a nominee may nominate himself (i). A direction by a testator that on the death of an executor the surviving executor is to appoint another to act with him is good (j). There is nothing in the Act which imposes upon a testator an obligation himself to name his executor. The Act does not preclude a testator from appointing as his executor such person as some one else selected by him may name for that purpose (k).

17. Remuneration. An executor or administrator is not entitled to claim any allowance for his personal trouble or loss of time in the discharge of his duties (l), unless remuneration has been provided for the executor in will. Even in such a case creditors have got a prior claim against the estate, if the estate be insolvent (m). Reasonable expenses actually incurred by the legal representative are to be paid out of the estate (n), but not expenses which arise out of his own default (o).

An executor, who is the surviving partner, is not entitled to any remuneration for continuing to carry on the business (p). A solicitor executor cannot have his

(a) *Re Wilmot* 2 Rob 579. *Re Langford*, 1 P & D 458

(b) *Re Johnson*, 1 Sw & Tr 17. *Hormusji v Bai Dhanbajji*, 12 B 164. *Mithubai v. Canji*, 26 B 571

(c) *Re Langford*, 1 P & D 458

(d) *Re Belts*, 30 L J P 167

(e) *Re Fester*, 2 P & D 304 W 144 12 Ed

(f) *Re Brown*, 2 P D 110

(g) *Re Thaker* 6 B 460. *Mithubai v Canji*, 26 B 571

(h) *Re Cringan* 1 Hagg Ecc 548 W 145 12 Ed

(i) *Re Ryder* 2 Sw & Tr 127, but

see *Re Sampson* (1906) 1 Ch 435

(j) *Re Deichman*, 3 Cun 123 W 145

(k) *Moola Haji v Haji Abdul*, 5 Bom L R 639

(l) *Robinson v Pell*, 3 P W 249.

Brocksopp v Barnes, 5 Madd 90

(m) *Re White*, (1893) 1 Ch 297, 2

Ch. 217. W 1216 12 W

(n) *Polls v Leighton*, 15 Ves 277.

Hide v Haywood 2 Ark 126.

Field v Peckett, 29 Beav 573

(o) W 1213

(p) *Burden v Burden* 1 V & B.

170, W 1214 12 Ed *Stocken v*

Danson, 6 Beav 371

bill of costs paid out of the estate (a). Solicitor trustees can only have their out of pocket costs allowed (b), unless there be a special contract or express provision in the will (c). "Where a member of a firm of solicitors is appointed an executor, it is so unusual to allow him to charge for professional work done by him or his firm that the insertion of such a clause would hardly raise a suspicion" (d). But this will not entitle the executor to charge for services which an ordinary executor is expected to perform without the intervention of a solicitor (e).

The Administrator General's Act (S 42) provides for the Administrator General charging fees in respect of his duties under the Act. A promise by a third party to pay remuneration to an executor for the performance of his duties may create a binding contract, although it creates an interest at variance with his duty (f). Those who take out letters of administration in this country under powers of attorney from executors and next of kin residing in foreign countries cannot charge commission upon estates so administered by them. An executor or administrator who risks the funds of an estate by mixing them with his own, and employs these for his own purposes, even temporarily, is in great danger of incurring criminal as well as civil liability (g). Where a Muhammadan testator allowed a certain remuneration to his executor it was held to be "a gratuitous bequest and nothing more than a legacy to the executor and certainly not in any sense a debt" (h). An executor is entitled to a refund of his own money used for the purposes of the testator's estate (i).

18. Coadjutor or Overseer. "Such a person has no power to administer or intermeddle otherwise than to counsel, persuade, and advise; and if that fail to remedy negligence or miscarrying in the executors, he may complain to the Court" (j). These persons "are looked upon only as candle holders having no power to do anything but to hold the candle, while the executors tell the deceased's money." Thus where a testator provided *inter alia* that no property left by him should be alienated without the consent of A, A was not a coadjutor or overseer (k). Where in order to help the *shebasts* by giving them sound advice the testator appointed certain persons as *osees*, held, that they were appointed as a consultative body, to give advice and superintend as coadjutors (l).

223. (S 183. P. 8.) Probate cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals, unless it is a company which satisfies the conditions

Persons to whom probate cannot be granted.

- (a) *New v Jones*, 1 Mac. & G 668, note W. 1214 12 Ed
- (b) *Christophers v White*, 10 Beav 523, *Moote v Frowd*, 3 My & Cr 45 W. 1214 12 Ed
- (c) *Christophers v White*, 10 Beav. 523
- (d) *Bal Gungabal v Bhugwandas*, 32 I A 142, 29 B 530
- (e) *Re Chalender*, 11 C. W. N ccviii
- (f) *Narayan v. Shajant*, 22 C 14
- (g) *Re Cowie*, 6 C. 70, 76-7.
- (h) *Aga Mahomed v Kooloom*, 1 C.

- W. N 449 P. C.
- (i) *Krishnarao v Benabal*, 20 B 571, 593
- (j) V 163 4, 11 Ed. *Sayaji v. Mullumabal*, 6 Bom L. R. 78.
- (k) *Eastern &c v Rebat*, 3 C L J 260.
- (l) *Brojo v Raj Kumar*, 6 C W. N. 310, see *Hamabal v Bamanji*, 7 B H C R. A. C. J 64, where two vakils were appointed to advise the widow, she was held to be executrix according to the tenor.

prescribed by rules to be made by the Governor General in Council in this behalf.

1 Change The words "nor unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, to a married woman without the previous consent of her husband" were added in this Act because the words "nor to a married husband" did not occur in the Probate and Administration Act but they were deleted by S 2 of Act. XVIII of 1927. The words 'nor behalf' have been added by Act XVII of 1931.

2. The section The section declares that if the executor appointed by a testator happen to be a minor or of unsound mind, during the period of his disability he is not entitled to probate (a) The reason is that a person suffering from either of the disabilities mentioned is not bound by his choice and he is not responsible for the consequences of his acts therefore he cannot be entrusted with the duties of administration of the estate of a deceased person. The section does not in any way restrict the choice of an executor (b) The Court can not refuse probate to an executor because it considers him unfit to be executor unless the unfitness is of the nature of legal incapacity, i.e. minority or unsoundness of mind (c) Where a testator appointed an executor and provided that on the executor's death his son "who shall be fit for the work" will act as his representative, it was held that the words meant a son who was free from the legal disqualifications mentioned in this section (d)

3 Minority The age of majority has been fixed at the age of 18 years for all persons seeking to deal with property within the jurisdiction of the Court whether they be persons domiciled in this country or not (e) Under S 2 (e) it should be remembered that the minority is prolonged till 21 where a guardian of the person or property has been appointed. As to the procedure to be followed in case of a minor executor, see Ss 244-246

4 Married women The necessity for consent has been removed in England by the Married Women's Property Act, 1882 (45 & 46 Vict c 75) (f) The old law remained stereotyped until quite recently in this country in respect of persons other than Hindus, etc. The removal of restriction in the case of Hindus, etc., is due to the fact that "the imposition of such a condition would be inconsistent with the proprietary status accorded to married women among a large proportion of persons for whom the Act is intended, and would confer a power on the husband which would, in many cases, be likely to be abused" (g) A married woman who has been granted probate enjoys all the powers of any ordinary administrator or executor (See S 315) The Amendment by Act XVIII of 1927, S 2, has the effect of placing a married woman of the class other than Hindus, etc on the same footing as Hindu etc or English married women

(a) *Evans v Tyler* 2 Rob 131, *Re Stewart*, 3 P & D 244. See S 244 sq for grants of letters of administration with the will annexed in such cases. *Bhagmal v Malik Singh*, 131 I C 339
(b) See S 222 note
(c) *Thoppal v Gocindarajalier*, 94 I C 73, *Hara Coomar v Doorgamoni*,

21 C 193, *Puran Nath v Jado Nath* 20 A 169 fold
(d) *Manki v Manrakhan* 56 I C 841
(e) *Re Sewnarain* 21 C 911
(f) See Law of Property Act 15 Geo v c 20 S 170
(g) Select Committee Report, Prob & Adm Act, 1881

5 Of unsound mind See S 59 note, p 72 sq

Grant of probate to several executors simultaneously or at different times

224 (S 184 P 9) When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of B's will by express appointment and C an executor of it by implication Probate may be granted to A and C at the same time or to A first and then to C, or to C first and then to A

1 The section A testator may appoint one executor or several Where there are several original executors appointed by the testator they hold the estate jointly and are viewed in law as one person so that probate granted to one enures for the benefit of all upon the ground that the property vests in all (a), even though the different executors be appointed for different purposes The other executors may accept the office and will thereupon fully represent the testator It is not necessary for them to take out probate afresh (b)

Executors who have not proved may join with those who have in bringing actions (c) A grant of probate to some of the executors does not debar the remaining executors to apply for probate, (d) Probate may be granted at different times (e) In the case of substituted executors they are not all to act simultaneously but the instituted executor is entitled to probate in the first instance (f)

Where there are several documents constituting the last will of a testator probate is granted of them all to the executors named therein, although no executor may have been appointed in one of those documents (g)

2 Practice of English Courts The practice of English Courts as to grant of probates to different executors at different times is thus stated — 'Where there are several executors upon the grant of probate to one of them, it is usual to reserve the power of making a like grant to others But this appears to be unnecessary, both because the probate already granted enures to their benefit and because they have a right to the grant, whether the power be reserved or not The practice is to take out what is called a double probate, which is in this manner, the first executor that comes in takes probate in the usual form, with reservation to the rest, afterwards, if another comes in, he is also to be sworn in the usual manner, and an engrossment of the original will is to be annexed to such probate in the same manner as the first and in the second grant such first grant

(a) *Hickler v Spencer* 2 B & Ald 36ⁿ 363, *Cummins v Cummins*, 3 J & La 64

(b) See above cases, *Hall v Brent* 7 Sim 512 and in 1 My & Cr 97

(c) *Brooks v Sroud* 1 Salk 3, *Hickler v Spencer* 3 B & Ald 360 See S 311

(d) *Re Atterk Sng* 18 1 C. 16,

42 P L R 1913 *Pearl v Beplin* 45 1 C. 336

(e) *Hart v Ramsam* 105 1 C. 626

(f) *Mithal v Canji* 26 B 571, 4 Bom. L R 9 *Hata Coomar v Doorgaront* 21 C 195 see S 222 note.

(g) *Re Nickalls* 4 Sw & Tr 40, see next S note

expressing together the whole testamentary intention of the testator" (a) If the later will be conditional the earlier one will be proved (b).

Where a testator disposed of properties in different countries by different wills with different executors, probate of the English will and of a codicil was granted on the ground that it was the wish of the testatrix to keep her English and American properties entirely separate (c). But where a will had been proved abroad and a codicil was subsequently found, the English court refused to allow the codicil to be proved in the English Court until it had been proved in the Court where probate of the will had been obtained (d) As to how the terms of a will have been modified by a codicil inconsistent with it, see *Deputy Commissioner v. Rani Bijai* (e)

Where by two testamentary instruments, not inconsistent with each other, a different 'sole executor' was appointed in each, it was held, they were jointly entitled to probate (f) But where an appointment in the codicil is tantamount to revocation of the appointment of the executors named in the will, probate will be granted to the former executor only (g) Where two persons were appointed 'whole and sole executrix' probate was granted to both (h) Where a testator simply said, 'I appoint A and B but referred to them later 'as my executors' or 'said executors,' probate was granted to them (i)

Where a will is revoked, the question, whether a codicil to that will can be proved, has given rise to conflicting decisions. But it may now be taken to be established "that a codicil will not be revoked merely by the destruction or mutilation of the will, and that the codicil notwithstanding remains effectual unless it appears that in revoking the will the testator thereby intended to revoke the codicil as well (j) The reason is that revocation of a testamentary instrument must, in order to be effective, be made in a manner prescribed by law (k). But it seems to be more correct to say that the revocation of a codicil depends upon the intention of the testator to be gathered from the circumstances of the case and where no such intention appears, probate will be granted of the codicil though the will be revoked (l) A codicil, however, unless it expressly revokes an earlier will or codicil does not prevent its operation (m)

226 (S 186. P 11). When probate has been granted

Accrual of representation to surviving executor to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

- (a) W 121 11 Ed *Townsend v Moore* 1905 P 66
 (b) Tr & C 33-4, W. 115 sq 11 Ed
 (c) *Re Schenley*, 8 C. W N cclxiv
 (d) *Re Miller* 8 P D 167
 (e) 22 C W N 305, 43 I C 987
 (f) *Greaves v Price*, 3 Sw & Tr 71
 (g) *Re Lowe*, 3 Sw & Tr 478- *Re Bailly*, 1 P & D 628 *Re Leese* 2 Sw & Tr 442
 (h) *Re Courl*, 2 Sw & Tr 485

- (i) *Re Bradley*, 8 P & D 215
 (j) W 95-6 12 Ed
 (k) *Re Savage*, 2 P & D 78, *Re Turner* 2 P & D 403, see *Falle v Godfrey*, 14 A C 70, 76
 (l) *Re Greig* 1 P & D 72, *Sugden v Lord St Leonards* 1 P D 154
Re Blackley, 8 P D 169, *Gardiner v Courtlope* 12 P D 14 W. 95 sq 12 Ed
 (m) *Adm Genl v Hughes*, 40 C 192

Death of one of several executors 'Upon the death of one of several representatives the office, with its incidents, duties and powers, and the interest in all the property vested in the representatives by virtue of their office, devolves upon the survivors or survivor' (a) In *Barada v Gajendra* (b), the right to perform certain religious ceremonies, conferred by the will exclusively on the executors, passed on the death of one of them to the remaining executors and was not transmitted to the heirs of the deceased executor

Death of sole executor. Where a sole executor dies the case is governed by S 232.

Transmission of executorship. In English law the office of executor is transmissible, and therefore on the death of a sole surviving executor, his executor on taking probate 'becomes executor *ipso facto* not only of that will, but also of the will of any testator, of whom the other was sole or surviving executor, and so on *ad infinitum* upwards. The condition of this rule, however, is that the will of each testator shall have been duly proved' (c) This is known as transmission of executorship. A derivative executor is in no way alluded to in the Act and therefore can have no existence under the Act. Provision is made however for the appointment of a new representative on the death of a sole or surviving executor or trustee where administration is not complete (d) When the sole executor dies, the executorship is not transmitted but is wholly determined (e)

227. (S 188. P. 12) Probate of a will when granted

Effect of probate establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

1. **The section** The section means that when probate has been granted the title of the executor is established to all properties of the deceased as from the death of the testator (f) But there has been some difficulty both in construing the words of this section and in determining the effect to be given to them. Thus in a leading case (g) it has been observed that this section is not to be construed literally so as to mean that there is no will at all exacting recognition of the dispositions made and the authority conferred by it. On the other hand, 'the section is intended to be a condensed statement of the English law, which regards probate as the authenticated evidence of the

(a) H Vol. 14 p 140 *Flanders v Clarke* 3 Atk 309, *Eyre v Shaffesbury*, 2 P. W. 102, 121. See S 312.

(b) 9 C. L. J 383, 13 C. W. N 557

(c) Tr & C 69 16 Ed

(d) *De Souza v S of S. for India* 12 B. L. R. 423, *Ranjit v Jagannath*, 12 C. 375, *Parmanandas v Venayekrao* 7 B. 19, *Ranchordas v Paratibai*, 26 I. A. 71, 23 B. 725, *Desputty v Desputty*,

2 C. 208, *Ma Pe v Ma Lat*, 57 I. C. 812, *Ramanatham v Ranganmal*, 27 I. C. 849

(e) *Nathu Ram v Alliance Bank*, 116 I. C. 558

(f) *Watkins v. Watkins*, 121 I. C. 177, for a case where the rule did not apply see *Upendra v Purendra*, 31 C. W. N 280

(g) *Shaik Moosa, v Shaik Essa*, 8 B. 241, 254-5, *Kadgala v Katreddi*, 62 M. L. J 365 P. C. (section explained)

will itself from which the executor derives his title, and by virtue of which the property of the testator vests in him from the death of the testator' Similarly, it has been pointed out that subject to a few modifications not material, 'the probate of the Indian Succession Act is substantially a reproduction of that which the Commissioners who framed the Act found in the English law' (a) The title conferred on an executor who has obtained probate by this section is obviously convenient as tending to facilitate the administration of the estate of the deceased and the adjustment of the rights of all parties connected with it (b) It also simplifies the proof of the executor's title as dating from the testator's death (c)

2 Effect of probate The English law with which the provisions of this section are said to be in substantial agreement has been thus summed up (d)

'Although the executor derives his title from the will by which he is appointed and not from the probate of the will yet it is the probate alone which authenticates his right, and the probate or something tantamount thereto is the only legitimate evidence of the property being vested in an executor or of the executor's appointment Therefore the original will cannot be read in evidence for that purpose unless it bears the seal of the Court, or some other mark of authentication (e) The seal of the Court on the probate proves itself A will therefore establishes three things in English law —(1) probate is the authenticated evidence of the will, (2) probate is the legitimate evidence of the property being vested in an executor and (3) probate is the legitimate evidence of the executor's appointment According to this section probate (4) establishes the will from the death of the testator and (5) renders valid all intermediate acts of the executor as such

(a) *Probate as evidence* Under S 213 no right as executor or legatee can be established in cases where the section applies without production of the probate This is not because the title of the executor depends on probate but because the production of the probate is the only way in which by the rules of the Court he is allowed to prove his title (f) 'The grant of probate is the method which the law specially provides for establishing the will (g) The will itself is no evidence (h) The Court is bound to assume that all documents admitted to probate are testamentary documents (i)

(a) *Probate as evidence of the vesting of the property in the executors* It has been already pointed out that the property vests in an executor from the time of the testator's death and not from that of the grant (j) The law knows no interval between the testator's death and the vesting of property in his representatives (k) Thus it has been held that a suit against a minor son of a testator is bad (l) On the testator's death an executor becomes clothed at once with ample

- (a) *Re Abraham* 21 B 139 149
 (b) *Kurritula n v Abbas Hossein* 32 I A 244 33 C 116
 (c) *Kadgala v Kafreddi* 62 M L J 365 P C
 (d) W 1511 12 11 Ed
 (e) *Pinney v Pinney* 8 B & C 335
 (f) See S 213 notes
 (g) *Komollochun v Nilrutton* 4 C 360, *Pinney v Hunt* 6 Ch D 100

- (h) *Pinney v Pinney* 8 B & C 335, see *Janaki v Dhanu* 14 M 454
 (i) *Re Barrance* (1910) 2 Ch 419
Re Wemler (1918) 1 Ch 339
 (1918) 2 Ch 82 *Whicker v Hume* 7 H L C 124 W 38, 12 Ed
 (j) See S 211 note
 (k) *Whitehead v Taylor* 10 A & E 210
 (l) *Dharendra v Saradindu* 9 C W N xci

powers In fact he is a complete executor except for the purpose of bringing an action before probate. Thus he can release a debt due to the testator, assent to a legacy, intermeddle with the goods of the testator and institute a suit (a) The property vests in the executor by virtue of the will and not of probate (b) The will gives the property to the executor The vesting of the testator's estate in the executor is not dependent upon the grant of probate (c)

(iii) *Probate as evidence of executor's appointment* The Probate Court declares a person to be entitled to the legal character of executor & his right to represent the estate of the testator (d) It confers the character of administrator (e) Under this section the only legal character conferred on grantees of probate or of letters of administration is the representative title of grantees as against debtors, etc., of persons holding property of the deceased (f)

Payment to a person who has obtained probate is a discharge to the debtor of the deceased even though the grant be subsequently revoked (g) A grant of probate to an executor has the effect of superseding a certificate obtained by him (h) After the grant of probate a person intermeddling with the estate of the testator will not constitute himself an executor *de son tort* (i)

(iv) *Probate establishes the will from the death of the testator* Under S 213 no right as executor or legatee can be established in court without production of the probate That is so because the law does not regard the will to be proved without production of the probate That section is not applicable to all cases (see sub sec 2) as this section is It follows that in every case a grant of probate will have the twofold effects mentioned in this section So long as the probate remains unrevoked no question can be raised whether the deceased died intestate or left a will (j), or whether the will is a forged one or has been procured by fraud (k) Probate even in common form unrevoked is conclusive as to the appointment of the executor and the validity and contents of the will (l) After grant of probate it cannot be proved that another was appointed executor (m)

Probate establishes the will from the testator's death The genuineness of a will cannot be questioned in a civil suit so long as probate remains unrevoked (n) Probate is also evidence of the executor's appointment and of the enjoyment of certain powers by him (o) Where a testator died in 1842 and his will was proved

- (a) *Wankford v Wankford*, 1 Salk. 301 W 188 12 Ed
- (b) *Komolochun v Nitrutton* 4 C 360, *Jehangir v Kukhal* 27 B 281, *Gonzales v Makis*, 24 M 394, *Shaik Moosa v Shaik Essa*, 8 B 241, 254 5
- (c) *Kadgala v Katreddi*, 62 M L J 365 P C.
- (d) *Bal Gangadhar v Ganesh*, 26 B 792, *Chintaman v Ramchandra*, 34 B 589
- (e) *Grish v Broughton* 14 C 861 875
- (f) *Arunmoyl v Mohendra* 20 C 888, *Jagannath v Runji* 25 C 354
- (g) *Allen v Dundas* 3 T R 125, *Debendra v Adm Genl* 35 I A 109 35 C. 955 *reld to in Gobinda v Mayatunnessa* 7 I C. 9

- (h) *Manchatam v Kalidas* 19 B 821 See S 283
- (i) *Nazarbhai v Pestonji* 21 B 400
- (j) *Grish v Broughton* 14 C 861, 874
- (k) *Re Bhobsoondun*, 6 C 460 The Probate Court is to determine whether the will is duly executed
- (l) *Griffiths v Hamilton*, 12 Ves 293, 307, *Kadgala v Katreddi* 62 M L J 365
- (m) *Allen v Dundas* 3 T R 125 130
- (n) *Komolochun v Nitrutton* 4 C 360 *Sheoparsan v Ramnandan* 20 C. W N 738 P C.
- (o) *Grish v Broughton* 14 C 861 875 see also *Hormusji v Dhanbhai* 12 B 164 *Bal Gangadhar v Sakwarbai* 26 B 792 796 *Chintaman v Ram* 34 B 589

by the executor in 1856 and the executor owed the testator a debt of £ 300, held, that probate related back to the death of the testator and the executor must be considered as having the £ 300 in his hands as assets and the claim against the executor was not barred by limitation (a).

(V) *Renders valid all intermediate acts.* The words 'renders valid' do not mean 'validates what was invalid before' but mean 'confirms the validity of' or 'supports'.

It is not to be supposed that before probate the acts done by an executor are not good in law or not legally binding or efficacious or are lacking in legal authority or force. The probate renders technically perfect or efficacious or immune from attack or objection acts against which exceptions might otherwise have been taken. Thus if payment be made to a person appointed as executor who has not taken out probate questions may arise whether the person to whom the payment is made is really entitled to receive it, whether the will in fact is genuine, whether the will has been revoked, and so forth. After grant of probate such questions cannot be raised (b). This section says that even if probate be taken afterwards the acts done by an executor prior to the grant will be rendered valid, i.e., cannot be impeached so long as the probate remains in force (c). "Hence probate when produced is said to have relation to the time of the testator's death" (d).

The will and not the probate gives the property to the executor (e). The property vests in the executor on the testator's death (f). There was nothing in the Probate and Administration Act to prevent an executor from acting as executor and exercising the powers given to him under that Act without obtaining probate (g), though under the Succession Act (see s. 213) a right as executor or alienee could not be enforced by suit without obtaining probate. (h)

3. *Probate is conclusive.* Probate not only establishes a will, but is conclusive as to the due execution of the will according to the law of the country where it is proved (i) and as to its genuineness (j). Probate unrevoked and even in common form is conclusive as to the validity and contents of the will and as to the appointment of the executor (k).

(a) *Ingle v. Richards*, No. 2, 28 Beav. 366; *Narrondas v. Narrondas*, 31 B. 418.

(b) *Allen v. Dundas*, 3 T. R. 125.

(c) *Haripriya v. Sarat*, 3 C. W. N. cxiii.

(d) *Whitehead v. Taylor*, 10 Ad. & El. 210; *Ingle v. Richards*, 28 Beav. 366. W. 207. 11 Ed.

(e) *Komollochun v. Nilruttun*, 4 C. 360; *Antony v. Makis*, 34 M. 395.

(f) *Jehangir v. Bai Kukibai*, 27 B. 281; *Mahomed v. Hargovandas*, 47 B. 231, 238 9; *Woolley v. Clark*, 5 B. & A. 744. See *Shaik Moossa v. Shaik Essa*, 8 B. 241, 245; *Mathuradas v. Goculdas*, 10 B. 468; *Lakhyia v. Umakanta*, 14 C. W. N. 256; *Behary v. Juggo*, 4 C.

1. See S. 211 note.

(g) *Ganapathi v. Steamalat*, 36 M. 575, 23 M. L. J. 306.

(h) *Mahomed v. Sabida*, 23 C. W. N. 658.

(i) *Whicker v. Hume*, 7 H. L. C. 124; *Allen v. Dundas*, 3 T. R. 125, 130.

(j) *Monmohini v. Banga*, 31 C. 357, 362; *Hormusji v. Bai Dhanbaiji*, 12 B. 164; *Bai Gangadhar v. Sakwarbai*, 26 B. 792, 796; *Chintaman v. Ram*, 34 B. 589; *Brajanath v. Anandmayi*, 8 B. L. R. O. C. J. 208, 220; *Rallabandi v. Rallabandi*, 31 M. L. J. 277. (H. cited); *Chandreshwar v. Bisheshwar*, 5 Pat. 777.

(k) *Griffiths v. Hamilton*, 12 Ves 298, 307; see *Jones v. Jones*, 3 Mer. 171. W. 381, 12 Ed.

S. 41 of the Evidence Act declares a judgment of a competent court of Probate to be a judgment *in rem*. Such a judgment will operate *in rem* only in respect of those matters of which the judgments are declared to be conclusive proof, in other words, in respect of matters which are established by the grant of probate and not of ancillary matters (a) Probate is proof of the contents of the will, it gives no efficacy to the provisions of the will (b) A judgment *in rem* is not open to collateral attack, but is conclusive not only on parties to the judgment but upon all persons and all courts (c).

The probate is conclusive as to every part of the will in respect of which it has been granted, therefore no question as to the validity of an interlineation can be entertained by a Court (d) so long as it remains in force (e) But equity will interfere in a case where a drawer of a will has fraudulently inserted his own name in place of a legatee (f) It may also be proved that the testator is alive (g) or that the letters are revoked (h) Where probate has been obtained by fraud on the next of kin equity will interfere (i) Probate can be impeached in a Civil Court only on grounds mentioned in S 41 of the Evidence Act (j) A proceeding for revocation lies in the Probate Court under s 263 (k).

The judgment of a Court refusing probate is not a judgement *in rem*, unless it expressly takes away from a person a legal character held by him (l) Therefore, after a refusal a fresh application for probate will lie unless the decision amounts to a declaration that the will propounded is not the genuine will of the testator. A fresh application will lie if probate be rejected on any other ground (m) A refusal is conclusive only of the facts necessary to support the decision. If the refusal be for some defect in procedure, or for default, there is no adjudication and the will may be again propounded by the same executor. An executor presenting an application for probate of a will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action (n).

4 Probate where not conclusive. Probate is not conclusive as regards the testator's domicile (o), or of the death of the testator or intestate (p), or of the

- (a) See *Jagannath v. Ranjit* 25 C 354, *Chinnasami v. Hanthara*, 16 M 380, 383 4, *Concha v. Concha*, 11 A C 541
- (b) *Khaw Sim v. Chuah Hoot*, 25 Bom L R 121 P C see *Bal Gangadhar v. Ganesh* 26 B 792
- (c) *Hemangini v. Sarat* 34 C. L. J 457, 66 I C 882, *Sheoparsan v. Ramnandan*, 20 C. W. N 738 P C.
- (d) *Plume v. Beale* 1 P W. 388
- (e) *Hemangini v. Sarat*, 34 C. L. J 457
- (f) *Bulkeley v. Wilford* 2 Cl & F 102 W 384 5, 12 Ed
- (g) *Allen v. Dundas*, 3 T R 125
- (h) W 1514 11 Ed
- (i) *Price v. Dewhurst* 4 My & Cr 76, 85, see *Allen v. McPherson*

- 1 H. L. C. 191
- (j) *Re Bhobasoondurt*, 6 C 460, *Daropt v. Santh*, 116 I C 452
- (k) *Monmohini v. Banga*, 31 C 357, 362
- (l) *Kalyanchand v. Sitabal*, 38 B 309 F B, per contra *Chinnasami v. Hanthara*, 16 M 380, 383
- (m) *Ganesh v. Ram*, 21 B 563, *Ganshamdass v. Saraseali*, 87 I C 621
- (n) *Ramani v. Kumud*, 14 C W N 924, see *Kalyanchand v. Sitabal*, 38 B 309 F B
- (o) *Bradford v. Young*, 26 Ch D 656, 29 Ch D 617, *Concha v. Concha* 11 A C 541
- (p) *Moons v. De Bernales*, 1 Russ 301, 307

perly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

1. Change. The words "whether dominions" have been substituted for the words "whether in the British dominions or in a foreign country"

2. The section. The section contemplates a grant of letters of administration with the will annexed when probate has been taken out in another province or country and states how the letters are to be obtained "A grant of probate or letters of administration cannot *de jure*, extend as a matter of right, beyond the territory of the Government which grants it If he (the grantee) desires to maintain a suit in any foreign country he must obtain new letters of administration and give new securities according to the rules of law prescribed in that country before the suit was brought (a) (See S 273) A grant under this section does not partake of the nature of a grant under Ss 276 or 278 and does not establish either the will or the representative character of the applicant Moreover a grant under this section is discretionary (b)

3 The rule 'In order to sue in any Court of this country in respect of the rights of property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in the Court of Probate of this country (c) If a will be made in a foreign country and proved there disposing of personal property in this country, the executor must prove the Will here also And generally speaking, the Court of Probate in this country will adopt the decision of the Court of Probate in the foreign country in which the testator died domiciled (d)

4 Probate of foreign wills. In English law probate of a foreign will of personal property may be given when the Court is satisfied of one of two things, (1) either the will is valid by the law of the country where the testator was domiciled, or (2) a Court of foreign country has acted upon it and given it efficiency (e) It is not absolutely necessary that the will should first be proved in the Courts of the domicile (f) Where, however, the will has been formally recognised and acted upon by the country of the testator's domicile, the Court of Probate in England will not allow the validity of such a will to be litigated in England (g) This section provides for the latter of the two alternatives set out above With regard to the first, Indian Courts, like a British Court if a testator has left personal property in England (h),

- (a) Story, Conflict of Laws 8 Ed S 512 cited in *Manasing v Amad* 17 M 14
 (b) *Deputy Commissioner v Jagad sh* 62 I C 513
 (c) *Whyte v Rose* 3 Q B 493, *Enohin v Wylie* 10 H L C 1, 19 *Bond v Graham* 1 Hare 842
 (d) *Re Rule*, 4 P D 76 *Re Lemme* 1892 P 89, *Re Von Linden* 1896

- P 148, see *Tourlon v Flower* 3 P W 369 W 242 12 Ed
 (e) *Re Deshals*, 34 L J P 58 *Miller v James* 3 P & D 4 W 241
 (f) *Soona Moyna v Soona Nacena* 20 C W N 833 35 I C 323
 (g) *Miller v James* 3 P & D 4
 (h) *Re De Pradel* 1 P & D 454, *Re Maraver*, 3 P & D 42

are authorised under S. 270 to grant probate or letters of administration if the deceased persons have left property within their jurisdiction irrespective of the place where the wills were executed or of the nationality of the deceased or of the place of their domicile (a). The Judge himself will have to take evidence as to the due execution of the will according to the law of the country in which the testator was domiciled, but the necessity of proof is dispensed with if probate has already been obtained (b). As to the qualifications of an expert competent to speak on foreign law see cases referred to below (c).

In two cases therefore letters of administration are necessary, (1) where the property is outside the jurisdiction of the Court which grants probate or letters of administration, because the jurisdiction of a Court of Probate is limited to property within the Province and does not extend to that outside, (2) if a grant be made in a foreign country, persons desirous of suing in England must have administration taken out (d). The rule is subject to an exception, *viz.*, where a testator makes two independent wills one disposing of property in this country and the other abroad, the former may be admitted to probate here (e), but not if the wills are not independent (f).

5. **Proved.** Proving a will means taking out probate (g).

6. **Properly authenticated.** The production of an authenticated copy dispenses with the necessity of proof of the original will (h). Thus where a will proved in France could not be obtained because forbidden by French law to be removed from the custody of the notary, it was held probate might be granted of a copy of the original will properly proved, limited to such time as might elapse before the original itself should be brought in (i). Where a Court in Mexico granted probate of a Spanish translation of a will, it was held the grant in England must be made upon the production of an English translation of a Spanish copy and not of a certified copy of the original (j).

7. **Exemplification.** An authenticated copy is called an exemplification. It "contains an exact copy of the will (if any) and a virtual, though not an exact, copy of the grant. A *testimonium* clause is signed by a registrar, and the seal of the Court is added. The name and address of the solicitor who extracted the grant are placed in the margin" (k).

8. **Letters of administration.** In England an ancillary probate is granted to an executor who has obtained probate in the country of the domicile

(a) *Re Pradel*, 1 P. & D. 454, *Re Maraver*, 3 P. & D. 42.

(b) *Bhaurao v. Lakshmbai*, 20 B. 607.

(c) *Re Dost Ally*, 6 P. D. 6; *Re Whitlegg* 1899 P. 267; *Bralley v. Rhodesia & Co.* (1910) 2 Ch 95. W. 239 12 Ed.

(d) *Wylie v. Rose*, 3 Q. B. 507; *Gnohin v. Wylie*, 10 H. L. C. 19.

(e) *Re Coode*, 1 P. & D. 449; *Re Astor*, 1 P. D. 150; *Re Murray*, 1896 P. 65; *Re Von Brentano*, 1911 P. 172. W. 236, 12 Ed.

(f) *Re Howden*, 43 L. J. P. 26; *Re Green*, 79 L. T. 38.

(g) *Mohamidu v. Pitchay*, 1894 A. C. 437.

(h) *Bhaurao v. Lakshmbai*, 20 B. 607; see *Re Dost Ally*, 6 P. D. 6.

(i) *Re Lemme*, 1892 P. 89; *Re Von Linden*, 1896 P. 148; *Re Von Faber*, 20 T. L. R. 640; *Sushilabala v. Anukul*, 22 C. W. N. 713, 44 I. C. 166 (the will need not continue to remain in deposit in the foreign Court and it is not essential for the copy to be authenticated by the seal of the Foreign Court.)

(j) *Re Rule*, 4 P. D. 76; *Re Clarke*, 36 L. J. P. 72. W. 242.

(k) T. & C. 337.

that as renunciation was not final until it was recorded, it could be withdrawn until it was filed. Application for retraction of renunciation comes too late when the grant of probate has already been made. The date of the grant is the date on which the order granting the probate is passed. (a). But it has been pointed out that the English law allowing retraction of renunciation is not applicable in this country. The words of the section are clear and do not admit of qualifications by engrafting exceptions on them (b).

231. (S. 195. P. 18) If an executor renounces, or fails to accept an executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration, with a copy of the will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

Procedure where executor renounces or fails to accept within time limited

The section. The section sets out one set of circumstances where administration with the will annexed may be granted although executors have been named in the will, the circumstances being either renunciation by the executor or his failure to accept within the time limited for acceptance or refusal thereof (c). This section therefore provides the procedure to be followed where an executor has renounced (i) before citation, or (ii) after or (iii) where he has been served with special citation and he fails to accept within the time limited (Ss. 229-230). The citation issued to an executor under similar circumstances by the English Probate Court calls upon him to accept or refuse the probate and executorship of the will and it has been observed that the language of this section is intended to mean what is more distinctly expressed in the English form of citation. Accordingly letters of administration with the will annexed were issued though the executor stated that she had not renounced and was already acting as executrix and administering the estate (d). In *Mordaunt v. Clarke* (e) an executor who had intermeddled but did not take out probate was cited but did not appear. The Court directed a peremptory order to be served upon him to take probate within ten days. Such time might have been granted in the Bombay case referred to above. There is no hard and fast rule within which an executor is bound to apply for probate or to renounce. In England it has been enacted that in respect of personal property any person not administering it within a certain period fixed by the statute shall be punishable by fine (f). The executor may take time to deliberate, but he must make up his mind within the time allowed by

(a) *Haril Ram v. Ram Ram*, 27 C. W. N. 285; 75 I. C. 218. Here on renunciation in Court by an executor probate was granted to another executor and a subsequent application by the renouncing executor for a grant to him was refused.

(b) *Brojolah v. Sharajubala*, 51 C. 745; *Raghuvar v. Gadodia*, 110 I. C. 506.
(c) *Sarajini v. Rajalakshmi*, 47 C. 838; 60 I. C. 974.
(d) *Molibal v. Karsandas* 19 B. 123.
(e) 1 P. & D. 592.
(f) 55 Geo. III c. 184 S. 37.

the Court in the notice or citation to accept or renounce (a) If he does not do so letters of administration with the will annexed may be granted (b) although executors have been named in the will It is however too late to refuse or renounce when one has once elected to act as executor, and he may determine such election by acts which amount to administration (c)

What constitutes acceptance and what not. Acts showing election to act as executor or intermeddling in the administration of the estate of the deceased are (1) anything done by the executor showing an intention to assume the office of executorship, (2) any act which will make a person liable as executor *de son tort* (d) but not acts of necessity (e) Acting as agent of another executor who has proved the will is not acceptance (f) even though there has been no formal renunciation by him (g)

The person Intestacy The ordinary rule is that the grant should follow the interest and letters are granted to the applicant whose interest is the greater (h)

232. (S 196 P. 19) When—

(a) the deceased has made a will, but has not appointed an executor, or

Grant of administration to universal or residuary legatees

(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or

(c) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered

1 The section It has been observed in the last section that on an executor renouncing or failing to accept probate letters of administration with the will annexed may be granted This section deals with other cases where such grants may be made These are (1) where no executor has been appointed by will (2) where the executor appointed is legally incapable or refuses to act or has died before grant of probate or (3) has died after having administered in part only

- (a) *Motibai v Karsandas* 19 B 123
 (b) *Kasraj v Bai Dinbai* 40 B 666 36 I C 373 *Brasolal v Sharakubala* 51 C 745
 (c) *Jnanendra v Jitendra* 32 C W N 108, 107 I C 70
 (d) *Long v Symes* 3 Hag 771 W 171
 (e) *Long v Symes* 3 Hag 771 see

- W 155 sq 12 Ed refd to in *Jnanendra v Jitendra* 32 C W N 108 107 I C 70
 (f) *Dove v Guetard* 1 Russ & M 231
 (g) *Stacey v Elph* 1 My & K 875
 (i) *Ma Sein v Ma Pua* 4

the estate of the deceased (a) In the last instance the administration that is granted is called administration *de bonis non* and will be a grant in respect of so much of the estate as is unadministered (S 258) The above cases are not meant to be exhaustive e.g. administration with the will annexed may be granted on account of physical incapacity of the executor (b) or where a testator has directed that the executor is not to act until after a certain interval of time (c) or where a will contains a valid execution of a power but not made according to the laws of the testator's domicile (d) or where an executor cannot be found (e) *In re Davis* (f) a sole executrix and universal legatee being incapable on account of ill health, of taking probate a joint grant of administration with the will annexed was made to her nominees The section has no application where there are executors willing and competent to act (g) The executor may be appointed expressly or by necessary implication (h) A person not constituted an executor by necessary implication should apply for a grant of letters of administration with the will annexed (i) The will may be construed by the Probate Court in order to determine whether a person is entitled to a grant under this section (j)

2 Legally incapable Legal incapacity arises from minority or unsoundness of mind (k)

3 Residuary or universal legatee The residuary legatee is preferred to the next of kin and is entitled to a grant because he is said to be the testator's choice (l) and he is not entitled to anything till the claims of all other legatees and creditors are satisfied If there be several residuary legatees any one of them may be appointed (m) A residuary legatee who is also a next of kin is preferred to other residuary legatees (n) A residuary legatee is entitled to letters of administration though there is no chance of any residue being left after administration of the estate (o) and though the residuary legatee be not beneficially interested but only entitled to a trust estate (p)

An universal legatee is a person to whom the testator has given the whole of his property he is entitled to a grant because the Court in fixing upon an administrator generally appoints one who has the greatest interest in the estate of the deceased (q) the principle being that the right of administration follows the right of property (r)

- (a) *Manki v Manrakhan* 56 I C 841
 (b) *Re Ponsonby* 1895 P 287 see *Gothandas v Ramcoover* 26 B 267
 (c) *Graysbrook v Fox* 1 Flowd 275 279 see *Re Vannini* 1901 P 330
 (d) *Re Trefond* 1899 P 247
 (e) *Re Sawtell* 2 Sw & Tr 448
 (f) 1906 P 330
 (g) *Kariman v Masill* 13 I C 171
 (h) *Kali v Annada* 15 C W N 1 S 222
 (i) *Kuppayammal v Ammani* 22 M

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 (j) *Arunmoy v Mohendia* 20 C 888
 (k) See S 236 *Babul Bhagwall v Bahuril* 5 Pat L J 347 57 I C 583
 (l) *West v Wellby* 3 Phil 374 384
 (m) *Re Stainion* 2 P & D 212
Re Lupton 1905 P 321
 (n) *Sawbridge v Hill* 2 P & D 219
 (o) *Thomas v Butler* 1 Ventr 219
 (p) W 333 12 Ed
 (q) W 377 11 Ed
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A residuary or universal legatee is entitled to letters of administration and not to probate (a), a grant of probate to him does not make him an executor but the grant is invalid from the beginning (b). Probate as defined in this section includes letters of administration (c).

4. Will. This word does not mean a testamentary instrument but the disposition made by it, otherwise when a will is not forthcoming the universal or residuary legatee cannot apply. Of course the execution of the will in the manner required by law must be proved (d)

233. (S. 197. P. 20). When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

Right to administration of representative of deceased residuary legatee

The section. The law is stated in similar language in Williams (e). The section is confined in its operation to a residuary legatee who has a beneficial interest under the will. If such a legatee survive the testator but die before he has fully administered the estate then his executors or administrators have the same right to administration as the residuary legatee (f). If an executor be also residuary legatee, and die before probate or die intestate, before he has fully administered the estate, administration *cum testamento annexo* shall be granted to his personal representative and not to the next of kin of the first testator (g).

Beneficially interested. A residuary legatee who is a mere trustee is entitled to administration under the preceding section in preference to the next of kin. This section requires the residuary legatee to have a beneficial interest under the will. Under this section administration is to be granted to those persons who have the beneficial interest in the residuary estate (h).

Procedure. In *Hari Bhusan v. Manmatha* (i) it is stated that the heir of a person entitled to a grant of administration cannot apply to be substituted in place of the latter on his death during the pendency of the application for grant of letters of administration with the will annexed, but must make a separate application for a grant to him. But this view has not been accepted in all cases (j).

- (a) *Re Shoshee*, 19 C 582.
- (b) *Pundit Prayag v. Goukaran*, 6 C W. N 787.
- (c) *Chandra v. Prasanna*, 38 C. 327, 10 C. W. N 864.
- (d) *Sarat v. Golap*, 21 I C. 121.
- (e) W. 333 12 Ed
- (f) W 333-4 12 Ed

- (g) *Wetdrill v Wright*, 2 Phil 243
- (h) W. 334 12 Ed, *Hutchinson v Lambert*, 3 Add 27, *Re Mc Auliffe*, 1895 P 290
- (i) 45 C 862, 51 I C. 76
- (j) *Phenki v Manhi*, 9 Pat. 673, 128 I C 128

the estate of the deceased (a) In the last instance the administration that is granted is called administration *de bonis non* and will be a grant in respect of so much of the estate as is unadministered (S 258). The above cases are not meant to be exhaustive, *e g*, administration with the will annexed may be granted on account of physical incapacity of the executor (b) or where a testator has directed that the executor is not to act until after a certain interval of time (c), or where a will contains a valid execution of a power but not made according to the laws of the testator's domicile (d) or where an executor cannot be found (e) In *re Davis* (f) a sole executrix and universal legatee being incapable, on account of ill health, of taking probate, a joint grant of administration with the will annexed was made to her nominees The section has no application where there are executors willing and competent to act (g) The executor may be appointed expressly or by necessary implication (h) A person not constituted an executor by necessary implication should apply for a grant of letters of administration with the will annexed (i) The will may be construed by the Probate Court in order to determine whether a person is entitled to a grant under this section (j)

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An universal legatee is a person to whom the testator has given the whole of his property, he is entitled to a grant because the Court in fixing upon an administrator generally appoints one who has the greatest interest in the estate of the deceased (q), the principle being that the right of administration follows the right of property (r)

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 (e) *Re Sawtell* 2 Sw & Tr 448
 (f) 1936 P 330
 (g) *Karlman v Masill* 13 I C 171
 (h) *Kali v Annada*, 15 C. W. N 1, S 222
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- (f) W. 333-4 12 Ed.

- (g) *Weldrill v. Wright*, 2 Phil. 243.
- (h) W. 334 12 Ed. *Hutchinson v. Lambert*, 3 Add. 27 ; *Re Mc Auliffe*, 1695 P. 290.
- (i) 45 C. 852, 51 I. C. 76.
- (j) *Phenik v. Manthi*, 9 Pat. 673, 125 I. C. 123.

234. (S. 198. P. 21) When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased

Grant of administration where no executor, nor residuary legatee nor representative of such legatee

if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

1 The section The executor, the universal or residuary legatee and the representative of a residuary legatee under certain circumstances (S 233), have successive rights to grants of administration. If those persons decline or be incapable of acting, or cannot be found, then the next of kin, i.e. the person who is entitled to succeed on intestacy (S, 218, 219), or a legatee, provided he has a beneficial interest (a), is entitled to a grant of letters of administration. There is no indication in the section that administration is to be granted to these parties in the order set out in the section. The representative of a universal legatee is not entitled to a grant (b). The section deals with cases where no executor has been appointed, or, if an executor has been appointed, he declines to act (c). The fact that a person claims under the will and his claim cannot be sustained will not deprive him of his right to administer the estate, if he be otherwise entitled to the grant under S 234 (d).

In English law the next of kin has a preferential right and he is to be excluded when he has no interest (e) or when he has interest but has renounced (f). In this country also citations are to be issued upon the next of kin of an intestate before grant of administration to a creditor (g), showing the priority of right of the next of kin to the grant so also in the case of a grant to a legatee (see S 235). The general rule with regard to a grant is that when 'a person having a prior right to take a grant, delays or declines to do so the Court at the instance of another having an inferior right will call upon the party having such prior right to take the grant, and on his failing to do so, may make an order in favour of the citor' (h). The right to the grant is a purely personal right and does not survive to the heir or legal representative of a claimant (i).

2 Discretion of Court Though the general rule is to grant administration to the largest interest yet the Court has undoubtedly a discretion in the

(a) In *Kamla Prasad v Murl* 94 I C 750 the grant was made to one whose claim under the will appeared to the Court to be unsustainable.

(b) *Kamla Prasad v Murl* 94 I C 750

(c) *Arumilli v Arumilli* 54 M 266

(d) *Kamla Prasad v Murl* 94 I C

750

(e) *Furlonger v Cox*, cited in *West v Willby*, 3 Phil 374

(f) *West v Willby* 3 Phil 374 *Re Cosh* 25 T L R 785

(g) *Re Beejraj* 10 C W N 1111. *Re Makhani* 15 C W N 350

(h) *Tr & C* 350 I

(i) *Ma Pe v Ma Lot*, 57 I C 812

matter (a), but the discretion must be exercised in accordance with rules formulated and acted upon for many years. The main object of the grant being the protection and benefit of the estate, the Court has a discretion to refuse the grant to a person who has the greatest interest if it considers that in his hands the estate will suffer irreparable loss and damage (b).

3. Right of creditor. A creditor of a deceased intestate is entitled to a grant of letters of administration (c), although his claim is barred (d). The appointment of a mortgagee as administrator does not extinguish his right of action unless he had assets sufficient to satisfy his debt and it does not in any event extinguish that of the co-mortgagees (e). A creditor has *locus standi* to come in the probate proceedings only in the event of a will being put forward to defraud creditors (f).

4 Grant to a stranger. Where there are no known relatives and no residuary legatees, or those entitled to administration all renounce, having regard to the special circumstances, limited grants of administration with the will annexed may be made to strangers (g).

5 The Administrator General. Under the Administrator-General's Act, (Act III of 1913 Ss 78-9) the Administrator General is entitled to administration where no next of kin applies for it (h) and before a creditor or legatee (other than an universal legatee) or a friend, and in case of a person not being a Hindu, etc., if no person entitled to it applies within a month of the death of the deceased for probate of letters of administration. The letters can be granted to the Administrator General only on the application of that official or of one of the parties concerned (i).

6 Attorney of executor. Administration with the will annexed cannot be granted to an attorney of an executrix who was granted authority to obtain confirmation of the trust, dispositions etc. with a view to realise the assets of the testator (j).

235. (S. 199. P. 22.) Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

(a) *Re Duncan*, 1 B L R O C 3

(b) *Babul Bhagwall v Bahari*, 5 Pat. L J 347, 57 I C 533

(c) *Re Makhan*, 15 C W N 350

(d) *Coombs v Coombs*, 1 P & D 298

(e) *Hossainara v Rahimannessa*, 35 C 342

(f) *Alshay v Prosonno*, 33 I C 539

(g) *Re Jackson*, 1592 P 257, *Re*

Moffatt, 1900 P 152, *Re Bolton*, 1693 P 186

(h) *De Mello v Broughton*, 11 B L R. Ap 6

(i) *Ma Pra v Yu Lwal*, 34 I C. 99

(j) *Re Renric*, 40 C. 74, 18 I C. 907

The section In laying down the rule that the next of kin must be cited before granting administration to a legatee this section apparently follows the rule that those who have a prior right must be cited before a grant is made to any other person (a) See rule 9 of the Calcutta High Court rules (testamentary and intestate jurisdiction) Where a will becomes inoperative, *eg* by the subsequent marriage of the testator and intestacy results no citation is necessary on the executor for the purpose of granting letters of administration (b) Citations should always be issued to parties who are known to the Court to be interested or to claim any interest in the estate of the deceased (c)

Next of kin The word 'next of kin' is used to denote the various persons entitled under S s 218 and 219 The term however has not been used in those sections It is defined in the Administrator General's Act (III of 1913) and not in this Act

To whom administration may not be granted 236. (S. 189 P 13) Letters of administration cannot be granted to any person who is a minor or is of unsound mind nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the Governor General in Council in this behalf

Change The words 'nor unless the deceased was a Hindu Muhammadan Buddhist, Sikh or Jaina or an exempted person to a married woman without the previous consent of her husband' occurring in the Succession Act of 1925 have been removed from the section by Act XVIII of 1927 S 2 The section as it now stands is a reproduction of the corresponding section in the Probate and Administration Act In the Succession Act of 1865 occurred the words 'nor to a married woman without the previous consent of her husband' The words 'nor behalf' have been added by Act XVII of 1931

The section Administrators like executors (S 223) are disqualified from acting as such if they are minors (d) A grant to a minor is a nullity (e) Minor for the purposes for this section means a person below the age of 18 irrespective of his domicile or nationality (f)

Right of guardian Letters of administration cannot be granted to a minor even under the guardianship of the minors father (g) They may however be granted to his legal guardian or to the person to whom the care of his estate has been committed provided the minor is the sole residuary or universal legatee (h) An administrator is not a guardian of the minor heirs of the deceased intestate (i)

- (a) See S 234 note *Woolley v Green* 3 Phil 314 *Re Walls* 1 Sw & Tr 538 but see *Re Baldwin* 1903 P 61 W 337 12 Ed
(b) *Re Shapoorjee* 5 C W N cxlvii
(c) *Ranmoy v Belly* 31 C. W N 160 100 I C 177
(d) *Re Orleans* 1 Sw & Tr 253
Re Meatyard 1903 P 125
Ma Nyl v Aung 9 L B R

- 186 50 I C 324 *Lavelle v Tabuni* 86 I C 92 *Re Yesheant*
bai 31 Bom L R 999
(f) *Re Sewnatain* 21 C 911
(g) *Jai Lal v Hari* 1908 A W N 257
(h) *Babul Bhagwati v Bahula* 57 I C 583 *Re Nitrojit* 34 C 706
11 C W N 697 See Ss 244 sq
(i) *Ma Nyl v Aung* 9 L B R 126 50 I C 324

Married woman. Before the Married Women's Property Act, 1882, a married woman could not take administration without the previous consent of her husband. That Act removed the disqualification of married women in England but the law as laid down in the Succession Act of 1865 was not changed. The restriction however was not extended to Hindus, *etc.*, to whom the Probate and Administration Act applied. Accordingly section 13 of that Act ended with the words 'of unsound mind'. The Select Committee in their Report stated that the imposition of such a condition would be inconsistent with the proprietary status accorded to married women among a large proportion of the persons for whom the Probate and Administration Act was intended and would confer a power on the husband which was in many cases likely to be abused. By the amendment made by Act XVIII of 1927 the disqualification of married women has been removed and the law brought into conformity with the English law.

CHAPTER II.

OF LIMITED GRANTS

This Chapter provides for the grant of administration limited in duration of time, (Ss 237—247) or to certain purposes only (Ss 248—254), or to a specified subject matter (Ss 255—260). The Probate rules of England provide that a limited grant of administration is not to be made unless every person entitled to a general grant has consented or renounced or has been cited and fails to appear, except under the direction of the Judge, and further that no person entitled to a general grant of administration of the personal effects of the deceased will be permitted to take a limited grant (R. 30). But a limited administration may be granted with the consent of the Judge (a) when good grounds are made out (b).

Grants limited in duration.

237. (S. 208. P. 24.) When a will has been lost or
Probate of copy or draft of lost will mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

(a) *Re l'on Brenfano*, (1911) P. 172.
 (b) *Re Somenet*, 1 P. & D. 350.

see *Sarda v. Tngana*, 3 Pat. L. J. 415, 45 L. C. 117.

1 The section This section and the following one deal with cases where wills have been lost destroyed, or mislaid but in a manner that does not betray any intention on the part of the particular testator concerned to revoke his will This is made clear by the words since the testators the testator Now when a will has been shown to be in the custody of the testator and is not found at his death the well known presumption of law arises that the will has been destroyed by the testator for the purpose of revoking it (a) The presumption in respect of a will not forthcoming after the testator's death does not arise unless there is evidence to satisfy the Court that it was not in existence at the time of his death (b) Therefore it is desirable that a search should be made for the missing instrument by a responsible person (c) The presumption as to revocation of a will not forthcoming is not strong in this country (d) Even in England this presumption may be rebutted by the facts (e) No presumption of revocation arises where it is shewn that the will was not in the possession of the testator (f)

2 Consequence of loss Letters of administration with the will annexed limited until a properly authenticated copy of the will be produced will be granted in such cases (g) The procedure to be followed in case of loss or destruction of a will is laid down in *Ishur v Doyamoyee* (h) and the general law discussed in *Sarat v Golap* (i) The grant will not be made until the presumption of revocation arising out of the loss of the will has been rebutted (j) Of course no such presumption arises where the loss occurs after the testator's death or the will has been destroyed by a third party and not the testator himself In order to annex a copy of the will, it is not necessary that the original will should be in existence Letters of administration should not be granted in such a case and if granted, the grant should be amended by the Probate Court by annexing to the letters a copy of the will (k)

The rule applies not only to wills but also to codicils (l) Where a codicil is lost since the testator's death and its contents cannot be proved the Court will grant probate of the will limited until the original or authentic copy thereof shall be brought in (m) If on the other hand a will be lost and its contents cannot be proved

- (a) *Welch v Phillips* 1 Moo P C 299 *Sugden v Lord St Leonards* 1 P D 154
 (b) *Anwar v S of S for India* 31 C 885 8 C W N 821 citing *Finch v Finch* 1 P & D 371
 (c) *Shib v Collector &c*, 29 A 82
 (d) *Chidambaram v Swaminatham* 13 M L J 135 *Efari v Podet* 55 C 482
 (e) *Sugden v Lord St Leonards* 1 P D 154 *Brown v Brown* 27 L J Q B 173 *Allan v Morrison* 1900 A C 604 *Gchensley v Platt* 1 P & D 281 *Johnson v Lyford* 1 P & D 546 *Harris v Knight*

- 15 P D 170 *Sarat v Golap* 18 C W N 527
 (f) *Efari v Podet* 55 C 482 110 1 C 283
 (g) *Ishur v Doyamoyee* 8 C 864 *Anwar v S of S for India* 31 C 885 *Re Cambell* 2 Hogg 555
 (h) 8 C 864 11 C L R 135
 (i) 21 1 C 121
 (j) *Kedar v Sorajini* 3 C W N 617 26 C 634
 (k) *Sukumari v Bharat* 20 C L J 148 26 1 C 980
 (l) *Re Dadds Dea* 290 164 E R 579
 (m) *Tr & C* 183

probate of a codicil to that will may be granted, if the dispositions contained in the codicil be independent of the will, limited until the lost will be found (a)

3 Probate of copy or draft limited The Court ordinarily requires a draft or copy of a lost or destroyed will to be propounded before admitting it to probate (b), but where a will is missing the Court has granted probate of an affidavit of scripts (filed in an action), and at other times of a deposition (c), or an extract from a deposition of a witness, if the documents contain the contents or substance or effect of a lost will or codicil (d) In *Lord St. Leonard's case*, (e) the Court granted probate of the declaration which pleaded the contents (f) A draft of a will (g), a press copy of the copy of a will (h), has been admitted to probate Where a will and a codicil have been torn by the testator's son, probate was granted of them as proved by oral evidence and by some of the pieces that were saved (i) But in case of a torn will missing words will not be read into the will and admitted to probate but when proved may be contained in a paper attached to the will (j)

4 Evidence When a will has been lost, destroyed or mislaid, not only must the contents of the will be proved but its due execution must also be established by clear evidence so as to remove all possible doubts from the mind of the Court (k) A missing will should be proved in solemn form (l), but not where the case is free from doubt (m) or the estate is small (n) Probate has been granted of a part of the will established by evidence (o)

5 Since the testator's death The words 'Since the testator's death' in this section have been held to qualify only the word mislaid (p) In England however the rule laid down in the section applies only to a case where the will has been in existence at the testator's death but is subsequently lost

238. (S 209 P 25) When a will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

Probate of contents of lost or destroyed will

- (a) *Re Greig*, 1 P & D 72, *Re Clements*, 1892 P 254
- (b) *Re Barber*, 1 P & D 267
- (c) *Trevelyan v Trevelyan* 1 Phil 149
- (d) *Sugden v Lord St Leonards*, 1 P D 154
- (e) 1 P D 154
- (f) Tr & C 183
- (g) *Powell v Settle* 8 C. W N clxxi
- (h) *Lafone v Griffin* 25 T L R 308
- (i) *Lafone v Griffin* 25 T L R 308, *Foster v Foster* 1 Add 462, *Re Leigh* 1892 P 82 W. 98 260, 12 Ed
- (j) *Gill v Gill* 1909 P 157 *Re Wright* 44 Ir L T 137 W 260 12 Ed

- (k) *Kedar v Sorajini*, 3 C. W. N 617, *Re Gardner*, 1 Sw & Tr 109, *Harris v Knight*, 15 P D 170, *Efari v Podel* 55 C 482 (the applicant for probate of the draft of a will must prove that the will has been lost or mislaid since the testator's death)
- (l) *Re Barber*, 1 P. & D 267
- (m) *Re Carter* 52 Sol Jol 600
- (n) *Re Apted*, 1899 P 272, see *Re Brassington* 1902 P 1.
- (o) *Sugden v Lord St. Leonards* 1 P D 154, *Kedar v Sorajini*, 3 C W N 617 *Girish v Rasharaj*, 1 C L. J 109 See next S notes
- (p) *Saraf v Golap* 21 I C 121, but see *Efari v Podel*, 55 C 482

The section. This section, like the proceeding one, applies only where the will has been destroyed and the destruction was not caused by the testator or his orders with the intention of revoking the will (a).

Evidence. In case of a will that is lost or destroyed the Court, as a general rule, requires the production of a draft copy of the will (b) because of the great danger of establishing a will merely by parol evidence of its contents. The evidence ought to be of extreme cogency and such as to satisfy one beyond all reasonable doubt that there is really before the Court substantially the testamentary intentions of the testator (c). The declarations of the testator himself after the making of the will have been held admissible in evidence (d). The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. When the contents of a will are not completely proved probate will be granted to the extent to which they are proved (e).

In *re Phibbs* (f) the contents of a will were proved by oral evidence supported by a letter containing the contents of the will and the will was held to have been duly executed though no attesting witness was available and probate was ordered to be issued. Where written evidence is forthcoming, as in the above case, the parol evidence is to be compared with the written and the Court will extract from both the contents of the will (g). Where a will is proved simply by parol evidence, the person setting up such a will must prove due execution and attestation of the will by clear and satisfactory evidence (h).

239. (S. 210 P. 26.) When the will is in the possession of a person residing out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced.

The section. The language of the section is borrowed from Coote's Probate Practice (i). The authorities cited in support are cases of wills made in foreign countries which have been proved there but require also to be proved in England,

- (a) *Ishur v Doyamoyee*, 8 C. 864
- (b) *Re Barber*, 1 P. & D. 267, *Re Pearson*, 1896 P. 289.
- (c) *Woodward v Goulstone*, 11 A. C. 469. Query, whether probate may be granted of a residuary bequest under a lost will?
- (d) *Sugden v Lord St Leonards*, 1 P. D. 154, but see observations on this point in *Woodward v. Goulstone*, 11 A. C. 469, 478 sq.

- (e) 485-6
- (f) *Sugden v Lord St Leonards*, 1 P. D. 154; see *Harris v Knight*, 15 P. D. 170, *Brown v Brown* 8 E. & B. 876
- (g) 1917 P. 93
- (h) *Burks v Burks*, 1 P. & D. 472
- (i) *Harris v Knight*, 15 P. D. 170, 179
- (i) P. 184

because there is personal property in England. In such cases if the wills be not available in England, and several countries forbid the removal of wills, it has been held that probate may be granted of copies of such wills, when proved abroad, limited to such time as might elapse before the original should be brought in (a). Where a foreign Court had possession of a will for custody and not for probate, a grant *ad colligenda* till the original or an exemplification could be brought in was made, though the copy of the will was not authenticated by the foreign Court but was a notarial copy (b). There must be an affidavit setting out the manner in which the will was transmitted. If transmitted to a person other than the executor he must join with the executor in the affidavit (c).

240 (S. 211. P. 27). Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it is produced.

English law. Grants such as those contemplated by this section are, in English law, generally made *ad colligenda* to protect the estate or limited to dealing with and completing the sale of a specified property (d). No such restrictions are, however, expressly laid down in this section. Thus in *re Metcalfe* (e) the will of the testator at the time of his death was in India, and the Court considering the inconvenience arising from the delay in the protection and management of the estate, if the Court was to wait till the arrival of the will in England, granted administration limited to certain purposes until the will or an authenticated copy of it should be transmitted to England. Similarly, in *re Wright* (f), a grant of administration limited to certain specified property until such time as the will might be forthcoming was granted. Here the Court was not satisfied that the will had been destroyed or lost. In *re Roberts* (g), a will and two codicils were in England and a third in India, the Court hesitated at first to grant probate of the former because there was no assurance that the third codicil would come before it for proof but ultimately granted it on the executor giving an undertaking to prove the third codicil when it or an authenticated copy of it would be sent over to England.

Grants for the use and benefit of others having right.

241. (S. 212. P. 28) When any executor is absent from the province in which application is made, and there is no executor within the province willing to act, letters of administration, with the will annexed, may be granted

- (a) *Re Lemme*, 1692 P. 89, *Re Von Linden*, 1896 P. 148; *Re Von Faber*, 20 T. L. R. 640. See S. 228 note.
 (b) *Re Brown*, 80 L. T. 360.
 (c) Tr. & C. 184. See Form No. 138. Tr. & C. 944.

- (d) *Ingpen* 145.
 (e) 1 Add. 343; commented in *Hewson v. Shelley*, (1914) 2 Ch. 13, 44.
 (f) 1893 P. 21. See *Re Campbell*, 2 Hagg. 555.
 (g) 3 P. & D. 110. Form of order set out in the Report.

to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

1. The section S 212 of the Act of 1865 uses the word 'attorney' S 28 of the Act of 1881 uses the word agent. Both these words are used in this Act—Notes on Clauses, The word attorney implied that the applicant must hold a power of attorney (general or special), duly executed by the executor, and the power must be stamped (a) and registered (b) The agent need not produce a duly executed power and his appointment may even be by word of mouth (c) In English law a formally executed power of attorney is not necessary, *eg*, a letter is enough (d).

2 The rule. The rule is based on the principle that "there should be somebody representing the estate and capable of managing it in the absence of the person appointed by the testator." The absence must be absence out of the realm (e) (here, outside the province). In the previous sections the grants were made to persons who were entitled to administration In this section and in the following one, acting on the same principle, *viz* providing for the management and protection of the estates, the Courts are empowered to grant the administration to the agent or the guardian of the persons entitled

"When a person is authorised by a power of attorney to take out administration the Court ought to decree him such administration as it would have granted to the person who conferred the power, if he had applied for it himself" The conditions of the administration bond are also the same (f) Direct appointment of an individual (or individuals) as attorney is necessary except in the case of a trust corporation But an attorney appointed by an attorney is accepted where substitution is allowed by the power or the law of the deceased's domicile (g)

A grant under this section can not be made to an attorney when there is a sharer in the estate who is in the Province and is willing to act (h)

3. Power of attorney The power must be so worded as to make the agent the lawfully constituted legal personal representative of the deceased and not merely to enable him to act on behalf of the absent executor in certain matters (i). A general power of attorney executed before the death of the testator has been held sufficient to justify the Court in making the grant (j) In case of a power executed before and authenticated by a Notary Public no affi-

- (a) Stamp Act Sched I Art 48
(b) Registration Act S 17
(c) Contract Act S 185, 187
(d) *Re Elderton*, 4 Hagg 210
(e) *Stater v May*, 1 Salk -
Hewson v Shelley, (1914)
13, 43, 44
(f) *Re Goldborough*, 1 Sw

- 295
(g) *Re Abdl* L. J. P. 59,
Tr & C
(h) *Essof v* C. 743
(i) *Re Rennie*, 18 I C
937
(j) *Re*

davit of identity is necessary (a) The Court shall presume such a power to be validly executed (b)

4 Absent from the province This section does not deal with the case of an executor who is absent from the province after obtaining a grant of probate in which case administration may be granted to a residuary legatee (c), although the executor may have appointed an attorney to act on his behalf (d) The attorney of the executors of a testator's property in England was granted administration with the will annexed in India on renunciation of the executor in India it appearing to the Court that the executors in England were intended by the testator to have the power of administering his assets everywhere (e) But where the person entitled is not absent but is actually residing in the country the court will decline to decree it to his attorney for his use and benefit (f) A grant has been made to a residuary legatee for the use and benefit of the executor who was incapacitated through illness limited till his recovery (g)

In England it has been held that the Court may grant administration to the agent of the next of kin, though the agent was residing abroad provided the sureties to the bond were resident within jurisdiction (h) But this case has been held not applicable in India because this section as well as S 240 require the agent to be within the jurisdiction of the court (i) Sureties resident abroad have been accepted in some cases (j)

5 Where there are several executors Where there are several executors but the agent is appointed by one of them only grant of administration with the will annexed may be made to him for the benefit of the executor appointing him until such time as the executor appointing him or any of the other executors shall apply (k) A joint grant may be allowed to two attorneys of two executors (each executor appointing his own attorney) for the use and benefit of the executors during their joint lives so as to cease on the death of either of the constituents or the attorneys or upon either executor applying for probate (l)

6 Rights and liabilities of the agent The estate vests in the agent on the grant of administration He is therefore liable to be sued in respect of the estate by the parties beneficially interested in it in the same way as if he had obtained letters of administration in his own right for he fully represents the estate so far as third parties are concerned (m) Payment to his principal is a good discharge against his liability to third persons (n) provided the principal has

- (a) *Re Mylne* 33 C. 625, *Re Henderson* 22 C. 491 but see *Re Primrose* 16 C. 776 See Cal H C. Rules.
 (b) S 85 Evidence Act
 (c) *Re Cooper* 1 Sw & Tr 66.
 (d) *Re Goldborough* 1 Sw & Tr 295 *Re Hale* 3 P & D 207
 (e) *Re Leckie* 15 B L R Appdx 8 *Re Barker* 1891 P 251
 (f) *Re Burch* 2 Sw & Tr 139
 (g) *Re Ponsonby* 1895 P 297

- (h) *Re Leeson*, 1 Sw & Tr 463
 (i) *Re Nesbitt* 4 B. L. R. Appdx 49
 (j) *Re Reed* 3 Sw & Tr 441, *Re Ballingall* 3 Sw & Tr 441 n. W 297 12 Ed
 (k) *Re Black* 13 P D 5
 (l) M 654, Tr. & C 132 cited
 (m) *Chambers v Bicknell* 2 Hare 536 *Re Denzell* 4 Drew 269 272 *Re Rendell* (1931) 1 Ch. 230
 (n) *Eames v Hacon* 18 Ch D 347

tion must be made on behalf of the guardian and not the minor (a) An application for grant of letters of administration to the husband for the use and benefit of his wife, a minor, as heiress to her deceased mother was held not maintainable until the applicant was appointed guardian of his minor wife Therefore where no guardian has been appointed two applications are necessary, first, to have a guardian appointed for the purpose of applying for letters of administration for the use and benefit of the minor and upon that being completed the application for a grant should be made (b) A petition for probate may be converted into one for letters of a administration (even in the Appeal Court) by adding a prayer for the grant of the letters (c)

3. Court of Wards. The Court of Wards is not a person to whom a grant can be made (d) There is however nothing to prevent the Court, if the testator wishes the minor's estate to be entrusted to the Court of Wards, from appointing the nominee of the Court of Wards (in most instances the Manager) administrator of the testator's estate under this section (e).

4 Discretion The Court has a discretion to grant administration to such person as it shall think fit (f) Thus it has been refused on the ground of age (g), or on that of poverty (h) or insolvency (i) As the appointment of a guardian prolongs the minority from 18 to 21, it will not be made when the alleged minor is on the point of attaining the age of 18 (j)

5 Duration of office and powers The powers of an administrator *durante minore aetate* are limited to the minority of the sole executor or sole residuary legatee as the case may be There is no other limit He is an ordinary administrator, appointed for the purpose of getting in the estate, paying the debts and selling the estate in the usual way (k) The powers of an administrator of a minor are wider than those of a guardian of the minor or manager of a minor's estate, because the latter cannot bind the minor or his estate by contract for the purchase of immovable property (l) On the death of the minor before attaining majority a fresh administration (*de bonis non*) has to be taken to the estate of the deceased (m)

An administrator *durante minore aetate* is accountable to the minor after the latter has obtained a grant (n) He is not liable to creditors if he has duly administered the estate and paid over the surplus to the executor of full age

- (a) *Babul Bhagwall v Bahurda* 5 Pat L J 347, 57 I C 583
 (b) *Re Nirojini*, 34 C 706 11 C. W N 697, see *Ma Kyin v Ma Shwe*, 36 I C 266
 (c) *Bhagmal v Malik Singh*, 131 I C 339
 (d) *Ganjessar v Collector &c.*, 25 C 795 2 C W N 349
 (e) *Re Troulucko*, 10 C W N 241.
Babul Bhagwall v Bahurda 5 Pat L J 347, 57 I C 583
 (f) *Hest v Willby* 3 Phil 379
 (g) *Re Ewing*, 1 Hagg 381
 (h) *Holers v Holers* Barnard C C

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 (i) *John v Bradbury*, 1 P & D 245
 (j) *Re Nazirun* 6 C 19
 (k) *Re Cope* 16 Ch D 49, *Monsell v Armstrong*, 14 Eq 423, *Re Thompson & M Williams Contract*, (1896) 1 I R 356
 (l) *Mir Sarwarjan v Fakhruruddin* 39 C. 232, 21 M L J 1156
 (m) *Re Girish* 6 C W. N 581
 (n) *Fotherby v Pate*, 3 Aik 603, or to any other person who has obtained a grant W. 350

but is liable for *derastant* even though a release may have been obtained from the minor executor (a) It is the duty of the successor in administration to recover the whole estate and to demand accounts from the administrator *durante minore aetate* (b) When an infant executor comes of age the powers of an administrator appointed under this section cease (c)

245. (S. 216 P 32) When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained his majority.

Administration during minority of several executors or residuary legatees

The section The section provides that where there are several executors or residuary legatees and they are all minors a limited grant as provided in the last section may be made limited till the attainment of age by one of the executors or residuary legatees Where administration was granted during the minority of two infants and one died the administration continued It would come to an end on the surviving infant attaining age (d) This section has no application where there are several executors and one of them at any rate is of full age In such a case a guardian of a minor executor is not entitled to a grant (e)

246. (S. 217. P. 33) If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estates applicable in the case of the deceased, is a minor or lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be

Administration for use and benefit of lunatic or minor

1 The section Section 217 of the Act of 1865 does not deal with the case of Minors S 33 of the Act of 1881 does As it appears to be merely *casus omissus* and the provision is in accordance with actual practice the language of S 33 of the Act of 1881 has been adopted —Notes on Clauses This has created needless repetition of the provision for grant of letters of administration to the guardian (S 244)

- (a) W 350-1
 (b) *Barada v Gajendra*, 13 C. W N 557 573 *Fotherby v Pate* 3 Atk. 603 and other cases *referred to*
 (c) *Booking v Jennings* 1 Mod 174

- referred to in Barada v Gajendra* 13 C. W N 557 573
 (d) *James v Stafford* 3 P W 89
 (e) See next S n 1

This section and S 244 form exceptions to the general rule laid down in S 236 that letters of administration cannot be granted to a person who is a minor or is of unsound mind. Letters of administration cannot be granted to a minor, but may be granted to his guardian (S 244), or to a person to whom the care of the minor's estate has been committed by competent authority where the minor is solely entitled to the estate of the intestate (a). This section further says that the law is same in case of a lunatic. The grant is discretionary and the main object of the grant is the protection and benefit of the estate. The court has no discretion to pass over a person having the largest interest in the estate merely on the ground that it would be more satisfactory to make the grant to another. The Act makes a special provision for a minor or a lunatic but does not take away administration from a disqualified proprietor who is not a minor or a lunatic (b). A grant under this section cannot be made where an executor is a lunatic or a minor (c) but there are other executors who are able and willing to act (d). Under this section administration may be granted to the committee of a sole executor who is a lunatic so found by inquisition (e). When an application is made under this section for grant of letters of administration for the use and benefit of a minor the appropriate provision of law which the Court should follow, on deciding to proceed in the matter, is that contained in the next section which gives special powers necessary for the custody and protection of property and is applicable to cases other than those mentioned in that section instead of having recourse to the provisions contained in another enactment namely O 39 r 1 of the Civil Procedure Code (f). A grant of letters of administration under this section has not the effect of extending the minority of the minor to 21 years (g).

2 Lunatic In order to justify a Court in making a grant under this section it is not necessary that a lunatic must be so found by inquisition (h). The section is confined to the cases of a sole executor (i) or a sole administrator (j) or a person solely entitled to the estate of the deceased intestate becoming insane. Where one of several executors becomes insane the probate is revoked and a fresh grant is made to those of sound mind reserving power to the lunatic to apply in order to join in the probate (k).

3 Such other person Where there is no person to whom the care of the estate of the minor or lunatic has been committed by competent authority

- (a) *Re Yeshwant bai* 31 Bom L R 999 (If the minor be entitled to the estate of the intestate with another who is of age, the grant cannot be made)
- (b) *Babul Bhagwall v Bahuria* 5 Pat L J 347 57 I C 583
- (c) *Pigot and Gascoigne's Case* Brownl 467 but the rule is different in case of next of kin or residuary legatee. See *Sambidge v Hill* 2 P & D 219 W 3423 12 Ed
- (d) *Re Hardstone* 1 Hagg 487
- (e) *Re Cooke* 1893 P 68
- (f) *Madhacrao v Annecklal* 2 Bom

- L R 797
- (g) *Lakshma v Gayagaraja* 24 M L J 450
- (h) *Re Evelyn* 2 M & K 3 see the procedure laid down to be followed in such cases
- (i) *Re Milnes* 3 Add 55 *Re Evelyn* 2 M & K 4
- (j) *Re Binckes* 1 Curt 286, see *Re Goldschmidt* 78 L T 763
- (k) *Re Shaw* 1905 P 92 Similarly in case of one of several administrators becoming insane *Re Phillips* 2 Add 335

the Court may grant administration to the residuary legatee (a), or, in case of his refusal, to the person entitled to a grant of administration to the estate of the lunatic (b), but the committee of the lunatic is preferred (c) Before granting administration to a person with an inferior right citation ought to issue (d) The practice that prevails where a sole administrator becomes insane is thus set out in *re Cooke* (e) —(i) to the committee when a lunatic has been found by inquisition and there is a committee of the property, (ii) to a person who has been appointed with general authority over the lunatic's property where a lunatic is not so found by inquisition, (iii) when the person appointed, as in the last case, has been conferred only special powers falling short of general powers he is not considered to be in the same position as a committee and is not entitled to a grant, (iv) to the next of kin of the deceased, where there is no committee and no person as aforesaid for the use of the lunatic so long as he shall remain a lunatic (f), (v) it has not been the practice to enquire whether the lunatic is likely to recover The list is not exhaustive for a grant has been made to a creditor, where the sole executor and residuary legatee was a lunatic (g) and to a residuary legatee by consent of the committee or without consent (h)

4 Grant for the benefit. These words are not to be construed as meaning that the grant is made to the minor and for his benefit through the intervention of a guardian or committee The section does not warrant the grant of letters of administration to a minor under the guardianship of any one, but provides that in certain cases letters may be granted to persons to whom the care of the minor's estate has been committed by competent authority Therefore a guardian enjoys a preferential right of appointment To render the section applicable, however, the minor must be solely entitled to the estate (i) The words undoubtedly create a special liability as between the administrator and the lunatic, so that the administrator becomes a trustee for the lunatic but do not affect the relations of the administrator to third parties (j)

5 Nature of the grant. The grant for the use and benefit of the lunatic is normally a general grant but may be limited (k) The grant may be limited both during minority and during lunacy (l) An administrator appointed under this section has the full powers of an ordinary administrator (m) If there be several executors or residuary legatees and they are all minors administration under this section may be made until one of them attain age If administration be granted to one during the minority of two infants and one dies the administration continues it comes to an end on the surviving infant attaining age (n)

- (a) *Radnall v Webb*, 3 AdJ 56
note
(b) *Re Cooke* 1895 P 63
(c) *Alford v Alford*, Dea 322, see
Re Cooke 1895 P 63
(d) *Windsor v Sharland* 2 P. & D
217
(e) 1895 P 63
(f) *Re Hastings* 4 P D 73 The
first grant is impounded in practice.
Re B. & C., 1 Can. 265.

- (g) *Re Atherton*, 1892 P 104
(h) *Re Miles* 3 AdJ 55, *Re*
Ponsonby, 1895 P 257
(i) *Jalal v Hart* 5 A. L. J 735
(j) *Bonny v Edwards* 41 C. 751
785
(k) *Re Cramp* 3 Phil 477
(l) *Re B. & C.*, 1 Lee 125
(m) *Bonny v Edwards* 41 C. 741
(n) *Jones v S. & C.*, 3 P W 7
69

247. (S. 218 P. 34). Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

1 The section The section is based on the Probate Act, 20 & 21 Vict c 77, s 70. An administrator *pendente lite* is appointed in order that he may discharge certain necessary functions which there is nobody else to discharge (a). Before the grant is issued duty or court fee must be paid by such an administrator (b). The Administrator General can be appointed administrator *pendente lite* see also Act III (1913) S 11.

2 Pending any suit. In order that an administrator *pendente lite* may be appointed there must be a suit pending in Court. Proceedings in caveat are not sufficient to justify such a grant (c). But when on a caveat being entered an application for probate is set down as a contentious cause, the executor named may be appointed administrator *pendente lite* (d).

The use of the word suit is unfortunate as it has been held that a probate proceeding is not a suit in which there is property in dispute (e). The Court of Probate Act used the word 'suit' which has been changed to 'legal proceedings' in the Administration of Estates Act, 15 Geo V c 23, s 163 (1).

3 Touching the validity of administration Originally it was considered in England that an administration, as contemplated by this section, could be granted only where there was a dispute about the right of administration to the estate of an intestate (f), but in *Walker v. Willaston* (g) it was decided that the Court had power to grant such administration when there was a will, and the dispute was about the executorship or the will because 'there being no executor that can sue, such case is within the same mischief' as that of intestacy (h). Since then it has been provided by the Court of Probate Act, s 70 in language similar to that of this section that an administrator *pendente lite* may be appointed 'pending any suit touching the validity of the Will or any grant of administration with powers similar to those laid down in this section'.

- (a) *Mortimer v. Paull* 2 P & D 85, *Madhav Rao v. Manecklal* 2 Bom L R 797, *Brindaban v. Surendrar*, 10 C L J 263 275
(b) *Maung Hlin v. Maung Po*, 95 I C 541
(c) *Saller v. Saller* 1896 P 291
(d) *Kuratulain v. Broughton* 1 C W. N. 336

- (e) *Nirod v. Chamathkar*, 19 C W N 205 see *Saroda v. Gobind* 12 C L J 91
(f) *Smyth v. Smyth*, 3 Keb 54 W 351 12 Ed
(g) 2 P W 576
(h) *Ball v. Oliver* 2 V & B 96, *Allinson v. Henshaw*, 2 V & B 65

4 Who can apply. It has been laid down in *Nirod v Chamatharini* (a) that this section contemplates an application by a party to the proceeding after the commencement thereof. But in English law the competency for making an application is not restricted to a party to a suit. Thus an appointment has been made at the instance of a creditor, who was not a party, where an administration suit was likely to be protracted (b).

5 When to be appointed. It has been observed that the Court should grant such an administration in all cases where the Court of Chancery would appoint a receiver (c). Such an appointment can not be made as a matter of course. It is necessary in each case that the Court should be satisfied that the appointment is necessary and proper (d). Thus the Court has refused to make the appointment in respect of a particular business against the wishes of the surviving partner (e), and in a pending suit regarding the validity of a part of a will when there was an executor willing and able to act (f). The Court has no jurisdiction to make an appointment before a writ of summons has been issued (g).

6 Who can be appointed. Formerly it was held that a party to a suit could not be appointed except by consent (h). A nominee of both parties was entitled to a grant (i). On appointment such nominee became the nominee of the Court (j). But in *re Griffin* (k) the Court declared that there was no absolute rule against appointing a party as administrator *pendente lite* without the consent of the parties. The Court may make such an appointment when desirable. Such administration has been granted to executors (l). Unless nominated by consent the Court must be satisfied as to the fitness of the proposed administrator (m).

7 Administrator *pendente lite* and receiver. The question whether an application for a receiver will lie pending a suit touching probate or administration is not settled. In several suits (n) the Chancery Division refused to entertain an application for a receiver. But recently the Chancery Division appointed a receiver pending a suit in Probate Division, though the Court expressed its opinion that it would be better to apply, where possible, to the Probate Division and as a general rule if an application had been made for one of the

(a) 19 C W N 205, 27 I C 617.

(b) *Tichborne v Tichborne*, 1 P & D 730. *Re Evans* 15 P D 215. see S 269. *Re Cleaver*, 1905 P 319. W. 353 12 Ed.

(c) *Bellew v Bellew*, 34 L. J P 125.

(d) *Jogendra v Alindra* 13 C L J 34, see *Bhuban v Kiran*, 13 C L J 47 (see cases cited), *Brindaban v Sureswar*, 10 C. L. J 263 275, *Pramila v Jyotindra* 28 C. W N 576 83 I C 597, see *Madhacrao v Maneklal* 2 Bom L R 797.

(e) *Harrell v Wills* 1 P & D 103.

(f) *Morlimer v Paull* 2 P & D 85. *reid* to in *Jogendra v Alindra*, 13 C. L J 34. In both cases the

appointment was considered to be unnecessary.

(g) *Salter v Salter*, 1896 P 291.

(h) *De Chatelain v Pontigny* 1 Sw & Tr 34, *Northey v Cock*, 1 Add 329.

(i) *Heller v Hellier*, 1 Lee 281 W 354 12 Ed.

(j) *Stanley v Bernes* 1 Hagg 221, 1925 P 38.

(k) *Wright v Rogers*, 2 P & D 179.

(l) *Northey v Cock* 1 Add 329.

(m) *Re Ivory* 10 Ch. D 372, *Veret v Duprez*, 6 Eq 329, *Hitchen v Birks*, 10 Eq 471. The older practice was to the contrary. *King v King* 6 Ves 172, *Ball v. Oliver* 2 V & B 96.

(n) *Re Ivory* 10 Ch. D 372, *Veret v Duprez*, 6 Eq 329, *Hitchen v Birks*, 10 Eq 471.

remedies the application in the other Division should be refused (a) The Probate Court has appointed an administrator *pendente lite* even though a receiver has been appointed by the Court of Chancery, in fact, the receiver has been appointed administrator *pendente lite* (b) The position of such an administrator is closely analogous to that of a receiver in a partition suit (c) As to the distinction between the position of a receiver in an ordinary suit and that of such an administrator see the argument of Counsel in *Meerza Kuratulain v Broughton* (d)

8 Powers of an administrator *pendente lite* Such an administrator may maintain actions for the recovery of debts due to the deceased (e) or actions in ejectment (f) He has power to grant a lease with the permission of the Court (g) But the Court cannot except by consent, authorise him to pay an annuity to one who was a residuary legatee or next of kin (h) In *Gourmoni v Baroda* (i) it was observed that the section empowered the Court to direct the administrator to do such acts as might be necessary in the interests of the parties to the proceedings and accordingly ordered certain payments to be made to a beneficiary under the will The administrator *pendente lite* has power to deal with the estate like an ordinary administrator subject to the restriction mentioned viz the right of distributing the estate (j) The restriction indicates the difference in the powers of an administrator *pendente lite* and an administrator *ad litem* appointed under S 251 The administrator *pendente lite* is bound to 'administer the estate according to the direction of the Court and in case of difficulty to obtain the direction of the court' (k) the duties of an administrator *pendente lite*, like those of a receiver, commence from the order of appointment (l) He has power to grant a *mokurari* lease with the permission of the Court (m)

9 Termination of office The functions of an administrator *pendente lite* terminate with a decree pronounced in favour of a will and do not continue till the executors have obtained probate If the decree is appealed from they do not cease till the appeal is disposed of (n) When his duties come to an end he must hand over the assets to the person held by the Court to be entitled to them Thus one administrator becoming *functus officio* by refusal of probate he was ordered to make over possession to another administrator (o) He may be

- (a) *Re Oakes* (1917) 1 Ch 230, *Re Wenge* 1911 W. N 129 W 356 12 Ed
(b) *Tichborne v Tichborne* 1 P & D 730, *Re Cleaver* 1905 P 319
(c) *Gour Moni v Baroda*, 44 I C 657
(d) 1 C W. N 336
(e) *Walker v Woollaston*, 2 P W 576
(f) *Jones v Goodrich* 10 Sim 328
(g) *Lasman v Bejoy* 11 C. W N cxcvi
(h) *Whittle v Keats* 35 L J P 54
(i) *Charlton v Hindmarsh* 1 Sw & Tr 519

- (j) 44 I C 657
(j) *Nirod v Chamatkarini* 19 C W N 205, 27 I C 617
(k) *Charlton v Hindmarsh*, 1 Sw & Tr 519, see *Tichborne v Tichborne*, 1 P & D 730,
(l) *Pramila v Jyotindra* 28 C W. N 576 579, 83 I C 597
(m) *Lasman v Bejoy*, 11 C W N cxcvi
(n) *Pramila v Jyotindra* 28 C. W N 576, *Taylor v Taylor* 6 P D 29 *Wieland v Bird* 1894 P 262 and other cases referred to *Radhika v Bonnerjee* 10 C W N 565
(o) *Re Gopal* 7 C W N ccciv

compelled to make the transfer (a) If he continue to hold and deal with the property he can be sued as an executor *de son tort* (b) In some cases he may be justified in retaining funds in his hands until his accounts are passed (c)

10 Immediate control An administrator *pendente lite* is subject to the immediate control of the Court and must act under its directions (d)

11 Liability to suit Such an administrator may be sued like an ordinary administrator without leave of Court (e) Proceedings against him cannot be stayed (f) An order discharging an administrator *pendente lite* on passing his accounts (and the subsequent passing of the accounts) is no bar to a suit for an account against him (g)

12 Miscellaneous An administrator *pendente lite* is entitled to a reasonable remuneration (h) When an application for injunction was made in a Probate Court the proper procedure to follow it was pointed out, was to apply to the Court for the appointment of such an administrator first and then to make the application for injunction (i) The Appeal Court has power to appoint an administrator *pendente lite* even though judgment has been pronounced in favour of the will and possession of the testator's estate has been taken by the executor (j)

Grants for special purposes

248 (S 219. P 35) If an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney or agent to take administration on his behalf, the letters of administration, with the will annexed, shall be limited accordingly

1 Change The words attorney or agent have been substituted for the word attorney occurring in the Succession Act and the word agent occurring in the Probate and Administration Act

2 The section The section has no application where there is no executor named by the testator (k) nor where the estate is vested in an executor (l) The section deals not only with limited grants of probate to executors appointed with limited powers or for limited purposes but also deals with limited grants to attorneys or agents of those executors The limitation on powers of attorneys or agents naturally follows from the limitations on the powers of the executors

- (a) *Re Grace* 1 Hag 313 315
 (b) *Ahlish v Radhika* 35 C. 276
 12 C. W. N. 237
 (c) *Island v Bid* 1894 P. 262.
 (d) *Madharao v Manecklal* 2 Bom
 L. R. 797 see *Gour Mont v*
 Bandu 44 1 C. 657
 (e) *Re Tolman*, (1897) 1 Ch. 866
 Kurafulain v Broughton, 1 C. W.
 N. 366.
 (f) *Martin v Tolman* 77 L. T.

138.
 (g) *Khilish v Beeky* 39 C. 597
 (h) *Pramila v Jyotinda* 83 1 C.
 597
 (i) *Nirod v Chamatkarini* 19 C. W.
 N. 205 27 L. C. 617
 (j) *Pramila v Jyotinda*, 28 C. W. N.
 576 83 L. C. 597
 (k) *Kuppayammal v Amman* 22 M.
 345
 (l) *Re Thaker Maharsji* 6 B.

3 Limited Probate A grant of probate is on the face of it, unlimited. In order to see whether the grant is limited in character or unlimited the Court must see the will to find out whether the Court of Probate did make a limited grant to the executor or an unlimited one. When there is no limitation whatever in the will the power of the executor is unlimited for the limitations in the probate follow from the limitations on the powers of the executors in the will (a). The testator may limit the powers of an executor in various ways. Thus, an executor may be appointed for a particular time *eg* for five years next after the testator's death or during the minority of his son, or the widowhood of his wife, or until the death or marriage of his son, or for a particular place (b), or for a particular thing only, such as a bond (c). Such an executor is entitled to a limited probate (d).

4 Procedure 'If a testator appoint an executor of his will generally and another executor for particular purposes (as stated above or to carry into effect the trusts and dispositions of a codicil), and the general and limited executors both apply for probate at the same time, the grant is made in the same instrument, but the powers of each are distinguished, that is to say probate is therein granted of all the estate of the deceased to the general executor and of that part thereof to the limited executor to which his executorship is expressly confined (e).

249 (S. 220. P. 36). If an executor appointed generally gives an authority to an attorney or agent to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

Change The words 'or agent' have been added in this Act

The section The section embodies the rule of law that the grant follows the terms of the power (f). But in England the Court can grant administration to an attorney on the same terms as it would have granted to the party himself if he had applied (g), where the limitation is not as regards the purpose but is in respect of the estate. The English rule has been thus stated — 'Where the power of attorney is limited to the administration of a specific portion of the estate, the grant may, if good reason be shewn to the registrars, be limited accordingly, but if the registrars consider that the constituent be entitled to a general grant, his attorney should take a grant of the whole estate (h).

(a) *Ramji v Bujan* 60 I C 352.
(b) *Velho v. Leite* 3 Sw & Tr 456,
Re Wallich 3 Sw & Tr 423.
Re Von Brenzano 1911 P 172.
but see *Re Cohen's Executors* (1902)
1 Ch 167, *Re Harris* 2 P & D
83

(c) *Doyle v Queen's Proctor* 2 Rob
413 See S 222 n.
(d) W 147 sq 12 Ed
(e) Tr & C 213 214
(f) See S 249 note
(g) *Re Goldsborough* 1 Sw & Tr 295
(h) Tr & C

250. (S 221. P. 37.) Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

1. Change The language of S 37 of the Act of 1881 has been adopted, but there is no change in the substance Notes on clauses

2 The section The scope and policy of the Probate and Administration Act was to give effect to the intention of the Legislature that no estate should be left unrepresented and to this end provisions were made for the grant of probate and letters of administration in a variety of cases (a) The section provides for a limited grant when the property in respect of which the application is made is property which was held by the deceased as trustee (b) and he died without leaving a personal representative (c) A member of a joint undivided Hindu family is not as such a person entitled under this section to an administration of the estate of a deceased member of the family (d) By virtue of a grant under this section the grantee does not acquire nor has he the power rightfully to dispose of any interest outside the limits of that grant (e)

3 The rule The general rule has been thus stated — "Whenever there is a legal interest outstanding, the beneficial owner or his representative is entitled to a grant limited to the property the legal estate in which was vested in the deceased at the time of his death provided that all persons entitled to represent the deceased have been cited or renounce" (f)

4 Administration of trust property The Probate and Administration Act provided for the grant of probate to wills and letters of administration to the estates of deceased persons and not for the administration of trust property generally, therefore this section can only apply to property in which a deceased person had ownership so as to constitute it a portion of his estate although he held it in trust (g)

Although a limited grant is to be made to the *cestus que trust* or beneficiary under this section he is, under English law, entitled to a general grant of administration to the estate of the deceased trustee, but in as much as he may not care to take upon himself this responsibility, the Court is authorised

- (a) *Ranjit v Jagannath*, 12 C. 375
- (b) *Re Prothero* 3 P. & D 209
- (c) *Pegg v Chamberlain* 1 Sw & Tr 527 *Re Ratcliffe*, 1899 P 110
- (d) *Gopalaswamy v Meenakshi*, 7 Rang 39, 115 I C. 905.
- (e) *De Silva v De Silva*, 5 Bom L

- R. 784
- (f) *Mortimer*, Probate Practice 2nd Ed 390 *Re Agnese*, 1900 P. 60
- (g) *Mohunt Jib v Mohunt Jaga*, 2 C. W N 16 C. W N 798, 16 I. C. 453

to "decree administration to the *cestui que trust* or his nominee, limited to the particular trust property after citation of the parties having a prior right to a general grant in default of renunciation or consent" (a).

Letters of administration should not be granted under this section where there is no estate which stands in need of administration, nor where it is not proved that the person on whose behalf the application has been made is a beneficiary within the meaning of this section, nor where the application is a transparent device to secure from the Probate Court a decision upon a contested question of title to property (b), nor where new trustees have been duly appointed when they or their nominee will be entitled to administration (c), nor where there are general executors appointed by the testator who alone are competent to prove the will when the trust will devolve on them and not on any special executor that may be appointed of the trust property (d).

5. Partnership property. A partner in whose name any partnership property stands is trustee of that property and he has no beneficial interest in it on his own account. On his death if he leaves no general representative or leaves one who is unable or unwilling to act as such the surviving partner is entitled under this section to apply for a grant of letters of administration to the estate of the deceased partner. The fact that the trustee might derive benefit from the trust property does not affect the application of the section (e).

6 Administration of endowed property. On the death of a *shebait* of an endowment without appointing another trustee and leaving no general representative, it was held, administration under this section devolved on the idol, the beneficiary, and somebody on its behalf might apply for administration (f). It is only in case of a dedication of the completest kind that an idol is regarded as a juridical person holding property though its possession and management vest in the *shebait*, in less complete endowments the heirs of the founder are beneficially interested subject to a charge for beneficial purposes (g). But it has been pointed out that the endowed property does not belong to the *mohunt*, and therefore he cannot be said to be its owner and it forms no part of his estate, so his successor in office is not entitled to take out administration of such property under this section (h). The office of *shebait* vests in the heir or heirs of the founder unless otherwise disposed of (i). In a Mitakshara family a person, on his birth, becomes entitled jointly as *shebait* of *debuttur* property held by the family (j). *Sadhus* and *sants* (objects of the trust) for whose benefit a

- (a) Tr. & C. 380, explaining *Pegg v Chamberlain* 1 Sw & Tr 527, fold in *Re Ratcliffe* 1899 P 110, see *Re Agnese*, 1900 P. 60, *Munav v Champernowne*, (1901) 2 J R 232
(b) *Prisono v Ram* 17 C L J 66
(c) Tr & C. 219
(d) *Re Parker's Trusts*, (1894) 1 Ch 707 commented on in W. 150

- 12 Ed
(e) *Re Adarji*, 55 B 795.
(f) *Ranjit v Jagannath*, 12 C. 375
(g) *Jagadindra v Hemantha*, 32 C 129
(h) *Mohunt Jib v Alkohunt Jaga*, 16 C W. N. 798, 161 C. 453
(i) *Gossami v Romanlalji* 16 I A. 137, 17 C. 3
(j) *Ram v Ram*, 33 C 507.

fund was given for maintaining a *dharmasala* in Bombay where held to be the true owners of the property (a).

7. A limited grant. A legatee can take out a grant limited to the amount of his legacy (b), though such a grant has been refused in certain cases (c). Where there are several beneficiaries the grant to the beneficiary who applies is limited to his share in the trust property, unless the other beneficiaries consent to the grant extending to their shares also (d). Where a trustee dies leaving a will, his will should be annexed to the grant (e).

251. (S. 222. P. 38.) When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution.

1. The section. The section provides that administration limited to a suit or suits may be granted for the purpose of securing representation of the estate of a deceased person with a view to commence a suit (f) or in a pending suit, where it is necessary that a representative of a deceased person should be made a party (g). Where a limited administration is granted under this section and the limited administrator is made a party to a cause, the estate of the deceased is perfectly represented for all purposes, to the extent of the authority conferred by the letters of administration, "where it is merely desired that the estate of the person who, if alive, would have been a necessary party to the proceeding" (h).

An administrator appointed under this section is known as administrator *ad litem* and is to be distinguished from an administrator *pendente lite* dealt with in S 247. An administrator *ad litem* is appointed when there is no one to represent the estate in a suit. Thus, a foreign executor cannot sue to recover a debt due to his testator in England without either proving the will there or having an administrator *ad litem* appointed, similarly no action can be brought against a foreign

(a) *Parmanandas v. Vinayekrao*, 9 L. A. 86, 7 B. 19

(b) *Re Baldwin*, 1903 P. 61. *Re Bloor*, 3 Curt 739; *Re Prothero*, 3 P. & D. 209.

(c) *Re Watts*, 1 Sw. & Tr 535; *Re Somerset*, 1 P. & D 350.

(d) *Pegg v Chamberlain*, 1 Sw & Tr. 527.

(e) *Re Butler*, 1893 P. 9

(f) *Woolley v. Green*, 3 Phillim 314

(g) *Maclean v. Dawson*, 1 Sw & Tr 425, *Detaynes v Robinson*, 24 Bear 66, 93, *Woolley v. Green*, 3 Phillim 314

(h) H. XIV. p. 205; *Faulkner v. Daniel*, 3 Hare 199, cited in *Doris v Charter*, 2 Ph 550; *Williams v Allen*, 4 D. C. F. & J 71; *Woodhouse v. Woodhouse*, 8 Eq 514

administrator in respect of the assets of the intestate (a) The reason is that Courts will not recognise any will not probated in the Courts of the country (b) In England such appointments are rare, for under the rules of the Supreme Court O. 16 r 46, the Court has power to appoint a person, where necessary, to represent the estate of a deceased person, or, may proceed with the suit in the absence of such a representative There is no similar provision in the Civil Procedure Code

2 Where a general grant is necessary. A limited grant is made where no kind of administration is involved in the suit, or it is simply necessary to have a particular question, in which the estate is interested, determined so as to bind the estate Where however general administration is wanted and the suit has been instituted for that purpose, or reliefs by way of accounts and enquiries are asked for in the suit, a general administrator has to be appointed and made party to the suit (c)

3 Practice. Jurisdiction. The Court in accordance with the practice of the Ecclesiastical Courts will make such limited grants on mere averment of interest without in any way considering the merits of the case (d) The Court that has jurisdiction to make a grant under this section is one to be determined under S 270 (e)

Terms of the grant The letters in such a case grant administration 'limited for the purpose only for the grantee to become and be made a party to the said original bill and to attend, supply, substantiate, and confirm the proceedings already had, or that shall or may hereafter be had in the said suit or in any other causes or suits which may hereafter be commenced in this Honourable Court or in any Court or Courts between the parties to the said original bill, or any other parties touching or concerning the matters at issue in the said cause, and to obey and carry into execution all orders and decrees of the Court relating to the said cause, until a final decree shall be had and made therein, and the said decree shall be carried into execution, and the execution thereof fully completed, but no further or otherwise, or in any other matter whatsoever' (f)

4. Powers of an administrator ad litem He has only authority to carry on the suit and no right to receive the fruits of it unless authorised by the Court to do so (g) Moneys are never paid out of court to an administrator ad litem (h)

5. Nominee Administration may be granted to the nominee of the plaintiff But in such a case those who have prior interests must all have renounced (i).

(a) W. 234 12 Ed Tyler v Bell 2 My & Cr 89, see Logan v Fairlie, 2 Sim & Stu 284

(b) Price v Dewhurst 4 My & Cr 76, Bond v Graham, 1 Hare 482

(c) Dowdeswell v Dowdeswell, 9 Ch D 294, Groves v Lane, 16 Jur 1061

(d) Maclean v Dawson 1 Sw & Tr 425

(e) Fardunji v Navajbal, 17 B 689
(f) Daps v Chanter, 2 Ph 545, 549 50

(g) Re Dodgson 1 Sw & Tr 259, Burdon v Morgan 2 P & D 371, 375

(h) Williams v Allen 32 Beav 650 (thesdnote)

(i) Tr & C. 221 2 Howell v Melcalfe 2 Add 348, see Fardunji v Navajbal, 17 B 689

252. (S 223 P. 39). If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the province within which the Court which has granted the probate or letters of administration exercises jurisdiction, the Court may grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect

1 Change The words 'exercises jurisdiction' have been substituted for the words 'is situate'. In place of the words 'the Court may grant' the corresponding words of the Succession Act were 'it shall be lawful for such Court to grant.'

2 The section. The section deals with the appointment of an administrator "limited to the purpose of becoming and being made a party to a suit against the executor or administrator, and carrying the decree which may be made therein into effect." In order that the section may apply the executor or administrator must be away from the jurisdiction of the Court which has made the grant (a). Thus where an administrator *de bonis non* settled in America (b), or in Scotland (c), a limited grant, as provided for in this section, was made

3 At the expiration of. These words mean 'at or after the expiration', and the section applies when there is residence out of jurisdiction at the time of the application (d).

4 To any person. The grant may be made to the personal representative of a legatee (e), the guardian of an infant legatee (f), the trustee in bankruptcy of an absent administrator (g), or even to the nominee of a residuary legatee (h). The Court does not require citation or service of formal notice upon the absent representative (i).

5 Death or return of the executor or original administrator. An administration for a limited period, e.g., *durante absentia* determines on the expiry of the period, but this section contemplates an administration for a limited purpose, i.e., to represent the absent executor or administrator and to carry the decree into effect. Therefore on the absent executor or administrator returning

- (a) See *Lowe v Fairlie*, 2 Madd 101.
 (b) *Re Colclough*, 19 L. R. Ir 235
 (c) *Hannay v Taynton*, 2 Add 505 n
 (d) *Re Ruddy* 2 P. & D. 330
 (e) *Re Collier*, 2 Sw & Tr 444
 (f) *Re Hampson* 1 P & D 1, *Re Lee*, (1898) 2 I R 81 W 359

- 60 I n
 (g) *Re Hammond*, 6 P. & D 104
 (h) *Re Camplin*, 1900 P 13, even when it is uncertain whether there will be a residue *Re Ruddy* 2 P & D 330
 (i) *Re Camplin*, 1900 P 13. H XIV p 199

during the pendency of the proceedings he must be made a party to the suit in the usual course, and the temporary administrator may account, have his costs and be discharged, the proceedings had are not interrupted (a). On the death of the absent executor or administrator, the authority of an administrator appointed under this section is not determined (b)

253. (S. 224. P. 40.) In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court.

Administration limited to collection and preservation of deceased's property.

1. Change. The word 'jurisdiction' has been substituted for the word 'district'

2. The section Grants made under this section are known as *ad colligendum bona*. The Courts are entitled to make such grants for the protection and preservation of the estates of deceased persons and for doing such acts as are incidental thereto, such as collecting the property, giving discharges for debts due to the estate and abiding the directions of the Court (c). Such an appointment is usually made when there is imminent danger to the estate (d), or where the person entitled to a grant is away (e), or is unwilling to act (f), and the estate will be endangered by the delay. "The Court is not bound to wait for the application of the persons entitled to an estate (*ex testamento* or *ab intestato*), but, when it may be endangered by delay in administering, the Court grants letters of administration *ad colligenda bona* for the purpose of preserving the property' (g).

3. Any person The selection of the person is within the discretion of the Court. Thus, such administration has been granted to a person entitled to a general administration, *eg*, a creditor (h), or to strangers (i), or to a friend of the deceased (j).

4. Authority of an administrator *ad colligendum bona*. The Court may authorise the administrator *ad colligendum* to do such other acts as it thinks necessary under the circumstances of the case, *eg*, to renew a lease (k), to sell the premises and goodwill of a business (l), to realise money due upon

- (a) *Rainsford v Taynton*, 7 Ves 460
- (b) *Taynton v Hanway*, 3 Bos & Pul 26 W. 361
- (c) *Re Radnall*, 2 Add 232, see *Re Rolland*, 4 C W. N exci
- (d) *Re Clarkington*, 2 Sw & Tr 380
- (e) *Re Gudolle*, cited in *Re Wyckoff* 3 Sw & Tr 22.
- (f) *Re Radnall* 2 Add 232
- (g) *Tr & C* 224
- (h) *Re Ashley*, 15 P. D 120, *Re*

- Clarkington*, 2 Sw & Tr 380
- (i) *Re Wyckoff*, 3 Sw & Tr 22, *Tr & C* 224; *Re Rolland* 4 C W. N exci (until next of kin of deceased be found)
- (j) *Re Rolland* 4 C W. N exci
- (k) *Re Clarkington*, 2 Sw & Tr 380
- (l) *Re Schwerdtfeger*, 1 P. D 424; *Re Bolton*, 1899 P 185, see *Whitehead v Palmer*, (1908) 1 K. B 151.

bills of exchange (a), to let the real estate and sell farming stock (b), to invest the assets (c) The powers of such an administrator are thus limited by the terms of the grant After paying the necessary expenses the balance is to be made over to Court, though the administrator may remain till a general grant is issued (d)

5. Another remedy An appointment under this section is not the only means of preserving the property of a deceased person Thus where at the time of the death of an intestate, his next of kin were in a part of South America, where it took six months to communicate with them, the Court, being satisfied that an immediate representation was necessary for the preservation of the personal estate of the deceased, made a general grant to a member of the firm in whose hands the books of the intestate's firm had been placed limited until such time as the next of kin should apply to take a full grant (e)

254. (S 225 P 41) (1) When a person has died

Appointment, as administrator of person other than one who in ordinary circumstances would be entitled to administration.

intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

(2) In every such case letters of administration may be limited or not as the Court thinks fit

1 Change The word Court has been substituted for the word Judge in the concluding line of the section

2 The section The section is based on the Court of Probate Act 1857 20 & 21 Vict c 77 s 73 S 251 is somewhat similarly worded but that section provides only for administration limited to suits An administrator appointed under this section, as distinguished from one appointed under S 253 has general powers of administration A title derived from an administrator *durante absentia* cannot be forced on an absent purchaser, not because the administrator had no estate but because there could be no constat that the exe

(a) *Re Gadolle* 3 Sw & Tr 22 cited in *Re Wyckoff* 3 Sw & Tr 20, *Re Metcalfe* 2 Add 350 Tr & C 224 6
(b) *Re Roberts* 1898 P 149

(c) *Re Wyckoff* 3 Sw & Tr 20
(d) *Re Stewart* 1 P & D 727
(e) *Re Suarez* 1897 P 82, see next section

cutor was still alive (a) The expression leaving a will to act is intended to refer to the time when the Court has to decide whether there is no executor willing and competent The fact that an executor has acted for a short time can make no difference so far as the powers of the Court are concerned if when the Court has to take action there is no executor willing and competent to act (b)

3 Selection of administrator The section provides that in the interest of the estate of a deceased person a grant of administration may be made to some person other than one who would be legally entitled to it in the ordinary course In other words the Court can pass over persons entitled to administration under S 219 (c) and has a discretionary power to grant it to others (d) for the protection and preservation of the estate of a deceased person and not as recognising any legal interest of the grantee (e) The section does not authorise the Court to direct that somebody else who has no present interest in the estate should be associated with the person legally entitled to letters of administration (f) nor does it authorise the Court to grant administration where there are persons entitled who can apply or have applied for a grant so that it really applies when the person entitled to administration is absent (or insolvent under the English Statute) otherwise the selection would be arbitrary (g)

Consanguinity is one of the elements to be taken into consideration but there are other elements as well such as the safety of the estate and the probability that the estate will be well administered The principle underlying the statutory provision has been thus stated — The selection rests with the discretion of the Court That discretion nowever is not to be arbitrarily or capriciously exercised but is a legal discretion governed by principle and sanctioned by practice in exercising it the Court is not to be guided by the wishes or feelings of parties but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property The first duty of the Court then is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims either in paying creditors or in making the distribution the primary object is the interest of the property (h) The section does not empower the Court to make a purely arbitrary selection from among persons contending for the grant The essential condition for the exercise of the Court's discretion is the presence of such special circumstances

- (a) *Webb v Kirby* 7 D M & G 376 reld to in *Hewson v Shelley* (1914) 2 Ch 13 43
 (b) *Gunamani v Esuadian* 110 I C 439
 (c) *Re Abinash* 7 C W N cclxv *Gunamani v Esuadian* 110 I C 439
 (d) *Re Parbally* 1 C W N cxiv As to how judicial discretion is to be exercised see *Sharp v Wakefield* 1891 A C 173 *Narendra v Charu* 7 C L J 558 12 C

- W N 747
 (e) *Re Kamineymancy* 21 C 697 see *Sharp v Wakefield* 1891 A C 173
 (f) *Annopu na v Kollyani* 21 C 164
 (g) *Haynes v Matthews* 1 Sw & Tr 460 see *Babut Bhagwati v Bahu la* 57 I C 583 587
 (h) *Warwick v Greville* 1 Ph II 123 125 cited in *Sivadas v Sund a* 40 C L J 24 82 1 C 392 see *Re Abinash* 7 C W N cclxv

in the case as render such a grant absolutely necessary, not convenient merely, as being a saving of time or expense to the applicant" (a)

4. Leaving a will of which there is no executor. These words do not mean that the section applies only when there is no executor willing to act at the time of the testator's death when the will comes into effect (as is the English law), but it is clearly intended to refer to the time when the Court has to decide whether there is no executor willing and competent. The fact, therefore, that a named executor has acted for a short time can make no difference (b)

5. Willing and competent. Where an executor was a lunatic (c), or under age (d), or could not be identified (e), such appointments have been made (f)

6. Resident out of the province. An executor cannot be superseded because of his bad character simply, he must also be resident out of the United Kingdom (g)

7. Necessary and convenient. There must be special circumstances to justify the Court in making the grant (h). The Court must be satisfied that the appointment is necessary or convenient in the interest of the estate (i). A case of pressing necessity should be made out before the Court is to use the extraordinary powers given by this section (j). Where the application is not *bona fide* the Court will refuse to exercise the discretionary power vested in it (k).

8. Having regard to consanguinity etc. The court will prefer a person entitled to administration to a stranger (l), therefore, as a general rule a grant under this section will not be made to one who is not entitled to a general grant (m). The court in its discretion may refuse to grant administration to the nominee of a person entitled to the grant (n) but with the consent of the parties interested it has been granted in other cases (o)

9. Where this section may be applied (p). (i) Where the only person entitled to the grant is resident of a distant country and immediate protection of the property is necessary (q). (ii) Where the executor and universal legatee predecease the testator, and the next of kin, being in a distant country, cannot

(a) *Babul Bhagwati v Bahula* 5 Pat. L. J. 347, 57 I C 583 587

(b) *Gnanamani v Esuvadian* 110 I C 439

(c) *Re Atherton* 1892 P 104

(d) *Re Stewart*, 3 P & D 244

(e) *Re Sawfell*, 2 Sw & Tr 448

(f) *W* 303 4 f n. 12 Ed

(g) *Re Sampson* 3 P & D 48, but see *Re Drawmer* 108 L T 732

(h) *Re White* 2 Sw & Tr 457, *Girja v Maitra* 31 C W N 874

(i) *Warwick v Greille*, 1 Phill 123

(j) *Re Cooke*, 1 Sw & Tr 267 see *Re Baleman*, 2 P & D 242.

(k) *Narendra v Charu* 7 C L. J. 558 12 C W N 747

(l) *Re Farrands* 1 P D 439, see *Hawke v Wedderburne*, 1 P. & D 594

(m) *Re Fairweather*, 2 Sw. & Tr 588

(n) *Teague v Wharton* 2 P & D 360, *Re Hale*, 3 P. & D 207, *Re Brotherton*, 1901 P 139 W 305 12 Ed

(o) *Farrell v Brownbill* 3 Sw & Tr 467, *Re Potter*, 1899 P. 265, *Re Davis*, 1906 P. 330, *Re Walkin*, 1915 P. 24 W 305 12 Ed

(p) M 678

(q) *Re Jones* 1 Sw & Tr 13 (grant made to father in law), see *Re Chiswell*, 1 P & D 192. *Re Cavendish*, 5 C W. N. cxxxv

be found (a) (iii) Where the executor nominated in the will cannot be found (b). (iv) Where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person (c). (v) Where a prostitute dies intestate, letters of administration may be granted to her natural sister, although the tie of kindred with her had ceased on the deceased becoming a degraded woman (d) Under this section letters of administration *de bonis non cum testamento annexo* were granted to an executor who had renounced" (e).

10. Citation In issuing a grant under this section citation is necessary but may be dispensed with where the prior right of a person is not based on Statute but is due to the practice of Court (f)

11 Person to whom grant has been made Grants have been made under the discretionary power vested in the Court to a beneficiary (g), to a creditor (h), to a guardian of minors (i), to the residuary legatee (with the will annexed) (j), to a partner of the executors (k), to a sole beneficiary (l) to one of the residuary legatees (m), to the trustee in bankruptcy of the sole next of kin (n), to the attorney of the next of kin abroad (o), to the official receiver as trustee in bankruptcy (p), to the next of kin of a murdered wife (q) to a stranger (r), to the next of kin and to a person entitled in distribution jointly (s), to a cousin (t), to a sister until the next of kin should apply (u), to the father in-law of the sole next of kin (v), to the mother (w), to a sister (x)

Grants with exception

255. (S 226 P. 42). Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

Probate or administration, with will annexed, subject to exception

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| <p>(a) <i>Re See</i>, 4 P D 86</p> <p>(b) <i>Re Sawtell</i>, 2 Sw & Tr 448</p> <p>(c) <i>Annapurna v Kallyani</i> 21 C 164, <i>Re Abinash</i>, 7 C W N cxxiv</p> <p>(d) <i>Re Kaminemonej</i>, 21 C 697, <i>Re Parbutty</i>, 1 C W N cxiv, but see <i>Hiralal v Tripura</i>, 40 C 650</p> <p>(e) <i>Re Makhun</i>, 3 C. W. N ccc xxxviii</p> <p>(f) W. 304 sq 12 Ed <i>Re Batterbee</i> 14 P D 39, <i>Re Atherton</i>, 1892 P. 104, <i>Re Crawshaw</i> 1893 P 108, <i>Re Moffatt</i>, 1900 P. 152, <i>Re Heerman</i> 1910 P 357</p> <p>(g) <i>Re Cooper</i>, 2 P & D 21</p> <p>(h) <i>Re Fraser</i> 1 P & D 327, <i>Re Heerman</i> 1910 P 357, <i>Re Farrands</i>, 1 P D 439</p> <p>(i) <i>Re Batterbee</i> 14 P D 39, <i>Re Arden</i>, 1898, P. 147</p> <p>(j) <i>Re Sawtell</i>, 2 Sw & Tr 448, <i>Re Munoy</i>, 1899 P 270</p> <p>(k) <i>Re Taylor</i> 1892 P 90</p> <p>(l) <i>Re Crawshaw</i>, 1893 P. 108</p> | <p>(m) <i>Re Massey</i>, 1899 P 270, <i>Re Williams</i>, 1918 P 122</p> <p>(n) <i>Re Turner</i> 12 P D 18, <i>Re Agnese</i>, 1900 P 60</p> <p>(o) <i>Re Escot</i> 4 Sw & Tr 186</p> <p>(p) <i>Re Bouron</i>, 84 L J P 92</p> <p>(q) <i>Re Crippen</i>, 1911 P 108, see <i>Re Hall</i>, 1914 P 1.</p> <p>(r) <i>Re Baleman</i>, 2 P & D 242, <i>Re Makhun</i> 3 C W N ccc xxxviii, <i>Re Hopkins</i> 3 P & D. 235</p> <p>(s) <i>Re Grundy</i> 1 P & D 459, <i>Re Walsh</i>, 1892 P 230</p> <p>(t) <i>Re Drinkwater</i> 2 Sw & Tr 611, see <i>Re Davis</i> 1906 P 330</p> <p>(u) <i>Re Cholwell</i>, 1 P & D 192</p> <p>(v) <i>Re Jones</i> 1 Sw & Tr 13</p> <p>(w) <i>Re Cavendish</i> 5 C W N cxxxvi</p> <p>(x) <i>Ma Shan v Mat Chll</i> 44 1 C 138, <i>Re Kaminemonej</i>, 21 C 697 see W. 304 f n 12 Ed for fuller list</p> |
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The section Ordinarily a grant of letters of administration under Ss 218 and 219 or of probate under S 222 should be of the entire property of the deceased (a) This section and the next provide for partial grants i.e. for grants with the exception of some portion of the testator's estate, but the section does not specify the circumstances under which such grants may be made Grants of this nature are entirely exceptional and should not be made unless a very strong reason is given (b) The grants are commonly made when the testator himself has appointed an executor for a special purpose, e.g. in respect of trusts created by the will or codicil and another executor for all other purposes When a grant with exception has been made, the only other application for a grant that would be entertained would be for the rest of the estate under S 257 (q v)

When grants subject to exception are made "If a testator appoints one executor for a special purpose or in respect to a specified fund only, and another executor for all other purposes the latter may take probate save and except that purpose or fund Or, on a renunciation or failure of the last mentioned executor or if there be no such other executor, the residuary legatee or devisee may take administration (with the will annexed) of the effects of the deceased under the same exception" (c). Therefore where a testator appoints executors under his will, but a separate executor to carry into effect the trusts and dispositions of a codicil if the general executor be the first to apply, the grant made to him will be save and except the property in respect of which a special executor has been appointed (d)

There is another class of cases where probate may be refused of a part of a will and therefore the grant must be subject to the part excluded These cases have been thus summed up (e) —A will may in part be admitted to probate and in part refused Thus if the Court be satisfied that a particular clause has been inserted in a will, by fraud without the knowledge of the testator in his lifetime (f) or by forgery after his death (g) or it would seem, if he had been induced by fraud to make it a part of his will (h), probate will be granted of the instrument with the reservation of that clause (even it seems where the rejection of the words renders the context ambiguous or meaningless) (i) or where a clause has been added *per incuriam* and the will was not read over to the deceased, the clause will be omitted (j) Offensive and scurrilous matters have been expunged from probate (k) A clause revoking all former wills (l) and a clause inserted after the execution of a will not signed and not attested (m) have been

- (a) *Abdul Ghafur v Jayarbat* 33 Bom L R. 1093
 (b) *Re Somerset* 1 P & D 350, see *Girija v Manindra* 31 C W N 874
 (c) Tr & C. 228 16 Ed.
 (d) H XIV 170
 (e) W 258 12 Ed
 (f) *Barton v Robins* 2 Phillim 455 note 1b
 (g) *Plume v Beale*, 1 P W 388.
 (h) *Allen v McPherson*, L. R. 1 H L 191
 (i) *Re Boehm* 1891 P 251 but see *Rhodes v Rhodes* 7 A C (198)

- (j) *Re Duane* 2 Sw & Tr 520, *Re Sharman* 1 P & D 661, *Re Oswald* 3 P & D 162, *Re Moore* 1892 P 378
 (k) *Curtis v Curtis*, 3 Add. 33 *Re Honeywood* 2 P & D 251 *Re White* 1914 P 153, *Re Heywood* 1915 P 47, where the military authorities objected to the publication of a soldier's will. W 259 12 Ed.
 (l) *Markham v Turner* 5 C. W N cxxxii, *Re Oswald* 3 P & D 162 fold
 (m) *Shama v Khellromant* 27 C 4 C. W N 501

deleted Where in a will certain clauses were inserted without the testator's knowledge they were excluded from probate (a)

Where grants subject to exception are not made A limited grant cannot be made where there is an executor without limitation appointed by the will (b), but under special circumstances a limited administration was granted in *re Cowar Ghosaul* (c) In England the rule in such a case is either to pronounce for the whole will or to declare an intestacy (d) It has been pointed out that it will lead to great inconvenience if separate letters of administration for separate portions of one estate be granted to all the various heirs of the deceased but exceptions can be made under certain circumstances under this section (e). Stamp duty is payable on the entire sum stated in petition as likely to come to the hands of the executor, even though by reason of a compromise the executor be empowered to recover a fraction of this sum (f)

256. (S. 227. P. 43). Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

The section Not only probate as stated in the last section but letters of administration also may be granted under this section subject to an exception A grant under this or the preceding section is called a grant 'save and except' or administration 'save and except' A grant may be made under this section where the will deals with a part of the testator's property and he dies intestate as to the rest (g)

The law has been thus laid down (h) — 'When a testator has made his will for a particular or limited purpose only, *eg* the administration of a fund vested in himself as trustee the administration of an estate vested in himself as executor or the administration of his own property in some particular district or country—and has died intestate as regards all other property of his own or vested in him the persons entitled to his undisposed of residuary estate or heir at law without waiting for the executor to take the limited probate which he is entitled to under such circumstances may take administration of the deceased's estate save and except what the testator has himself excepted

Ordinarily Hindus cannot take limited administration under this section but must take general letters yet exception may be made under special circumstances (i)

- (a) *Girish v Rastara* 1 C L J 109
 (b) *Re Ram Chand* 5 C. 2 *Re Girish* 6 C 483 *Re Thaker* 6 B 460 *Satpal v Collector of Multan* 12 Lah 584
 (c) 10 C. 554 *Mohim v Sarajubala*, 9 C L J 576
 (d) W 262 12 Ed referring to *Spratt v Hacks* 4 Hag 408, *Re Ford*, (1902) 1 Ch 218 (1902) 2 Ch

- 605
 (e) *Mohim v Sarajubala* 9 C L J 576
 (f) *Satpal v Collector of Multan* 12 Lah 584
 (g) *Stoney v Stoney* 72 1 C 811 813, *Re Mann* 1891 P 293 (property abroad)
 (h) Tr & C 228 9
 (i) See previous S Note

Practice If a testator appoints one executor for a special purpose or in respect of a special part of his estate, and another executor for all other purposes, probate is granted to the latter, if he is the first to apply, save and except that special purpose or specific part of the estate. On the other hand, if the limited executor is the first to obtain a grant, the other may take probate *ceterorum* i. e., of the rest of the testator's property (see next section). If both executors apply simultaneously the grant may be made in the same instrument, but the powers of the executors are distinguished, i. e., probate is granted to the general executor of all the estate save and except the property which vests in the limited executor, and probate is granted to the limited executor restricted in accordance with the will (a).

Grants of the rest.

257. (S. 228. P. 44) Whenever a grant with excep-
 Probate or ad tion of probate, or of letters of administration
 ministration of rest with or without the will annexed, has been
 made, the person entitled to probate or administration of the
 remainder of the deceased's estate may take a grant of probate
 or letters of administration, as the case may be, of the rest of
 the deceased's estate.

The section A grant under this section is a complement of a limited grant, the two together make up a complete grant of administration of the entire estate. After a limited grant of administration has been made under S. 255 any other application for grant of letters should come under this section. The section does not authorise different people to get individual grants limited to the particular property which they happen to claim (b).

Cæterorum grant. After a grant save and except has been made under either of the two preceding sections a grant of probate or of administration may be made of the rest or remainder of the deceased's estate. This is known as a *cæterorum* grant. Where there is a general executor under a will and also a special executor with limited functions under the will or codicil, if "the special executor obtain his grant first, the subsequent grant made to the general executor is called a *cæterorum* grant (c)" "The probate or administration following upon such a limited grant (as has been dealt with in the last two sections) is *cæterorum*, it is a grant for that part of the estate, or for that purpose, which was excluded from the scope of the grant 'save and except (d).'

Grant of effects unadministered

258. (S. 229 P. 45). If an executor to whom probate
 Grant of effects has been granted has died, leaving a part of
 unadministered the testator's estate unadministered, a new

(a) Mortimer, Probate Practice 449
 (b) *Ginfa v Manindra* 31 C W N
 874, 103 I C 692

(c) H. XIV 170 See previous S
 note.
 (d) Tr & C 230, see Mortimer, 300

representative may be appointed for the purpose of administering such part of the estate.

1. The section The section applies (1) where a sole executor or the sole survivor of the acting executors dies after taking out probate, (2) before completing the administration of the estate, because the estate is absolutely unrepresented until someone comes forward and gets a grant of letters (a) The Probate and Administration Act, it has been pointed out, sought to avoid this absence of representation (b) It does not apply (1) where there are executors alive who have taken probate, or, (2) where no probate has been taken (c) All grants of whatever description, whether general or limited may be followed by a grant of administration *de bonis non* (d).

Where there are several executors on the death of one, a *de bonis* administration cannot be obtained for the representation in such a case accrues to the surviving executors (e) Therefore a *de bonis* grant is made where an executor or administrator has obtained a grant but has died after partially administering the estate or not at all, but where no probate or letters of administration have been obtained at all, the grant that is made is an original grant A *de bonis* grant is thus a second or supplementary grant made for the purpose of completing the administration of an estate already begun The section makes it clear by the words 'to whom estate unadministered' Where an executor dies without having fully administered the trusts of the will or not having administered them at all, the administration that becomes necessary is called administration *de bonis non*, that is, of the goods left unadministered by the former executor Therefore, on the death of an executor under such circumstances as the heir can not bring a suit to recover the rent of the estate, an administrator *de bonis non* has to be appointed (f)

2. On administrator's death There is no provision made in the section as to what is to happen on the death of the sole or sole surviving administrator It has been held however that a grant *de bonis non* may be made not only on the death of an executor but also on the death of an administrator without fully administering the estate Thus where letters of administration *durante minore etate* were granted to a widow, upon the death of the minor before the estate had been fully administered, *held*, the widow was entitled to a *de bonis* grant (g) Administration *de bonis non* has been granted on the death of an administrator with the will annexed (h) Such cases, it should be noticed do not come within the language of the section which is confined to the case of the death of an executor Where the original administrator of a deceased

- (a) *De Souza v S of S for India*,
12 B L R O C 423
Narasimulu v Gulam Hussain 16
M 71
(b) *Ranjit v Jagannatha* 12 C 375
(c) *Wankford v Wankford* 1 Salk
299, 308
(d) *Ti & C.*

- (e) S 226
(f) *Narasimulu v Gulam* 16 M
71
(g) *Re Girls* 6 C W N 581, *Re*
Patterson 2 C W N cccix
(h) *Re Akhun* 3 C W N ccc
xxxxiii

intestate could not be found administration *de bonis non* was granted to one of the next of kin upon her affidavit that she believed the original administrator (her brother) to be dead (a)

3 Leaving unadministered As the object of a *de bonis grant* is to complete the administration of the estate of the deceased it is clear such a grant will not be made if the estate in fact has been fully administered The application must show that there was some estate of the deceased which require to be administered (b) Similarly applications for sale (c) or mortgage (d) have been refused where they were not necessary for the purposes of administration Permission to alienate property cannot be granted where administration is complete (e) Such permission cannot be granted to an administrator *de bonis non* (f) A presumption of having completed the administration has been said to arise after the lapse of twenty years (g)

4 Death of shebait In case of an endowment a *shebait* is always necessary to take possession of the property and manage it Administration can never be said to be complete in such a case (h) On the death of a *shebait* a new *shebait* or an administrator has to be appointed because the trust is of a perpetual character 'So long as an administrator is not appointed the estate would be wholly unrepresented (i) But it has been pointed out that a *shebait* administering the affairs of an idol is not an administrator in the strict technical sense in which that term is used in connection with the estate of a deceased person (j) Accordingly an application for letters of administration by the successor on the death of a *mohunt* was refused (k)

5 Powers of an administrator *de bonis non* An administrator *de bonis non* succeeds to all the legal rights which belonged to the legal representative under the original grant and his duty is to continue the administration of the estate of the deceased (l) He is entitled to sue upon bills of exchange endorsed in favour of the legal representative of the deceased (m) he can collect the property of the deceased testator (n) can realise assets that are in the hands of third persons (o) can enforce a promise made to an executor (p) As has been observed in *Barada v Gajendra* (q) it is the duty of the successor in the administration to recover the whole estate to take possession of it demand

(a) *Re Saket* 1909 P 233

(b) *Chandi v Banke* 10 C W N 432
Lakshmi v Nandan 9 C L J 116

(c) *Re Hemming* 23 C 579

(d) *Re Nursing* 3 C W N 635
fold in *Lal v Baikuntha* 14 C W N 463

(e) *Gour v Monmohini* 25 C W N 332

(f) *Re Hemming* 23 C 579

(g) *Chandi v Banke* 10 C W N 432

(h) *Parmanandas v Vinayekrao* 91 A. 86 7 B 19

(i) *Ranjit v Jagannath* 12 C 375

(j) *Jblal v Jog Mohan*, 16 C W N

798 801

(k) *Gour v Monmohini* 25 C W N 332

(l) See *Re Hemming* 23 C 579

(m) *Catherwood v Chabaud* 1 B & C. 150 154

(n) *Wankford v Wankford* 1 Salk. 306

(o) *Langford v Mahony*, 4 Dr & W 107

(p) *Hart v Smith* 7 T R 182 W 551 12 Ed

(q) 9 C. L. J 383 13 C W N 557 (see cases cited) *Bal Meherb v Magan Chand* 29 B 96 6 L. R. 853

It should be noted that a *cessate* grant is made to the party entitled to the original grant. Generally speaking, on the death of a person, if a grant becomes ineffectual then a grant *de bonis non* is made and not a *cessate* grant. A *cessate* grant is a general grant not limited to effects unadministered though such is the practice in England from 1897. The substituted executor takes the executor's oath but swears the estate at the value only of what remains undistributed but in case of letters of administration under a *cessate* grant an administrator taking such a grant has to furnish security to the same amount as the original administrator (a).

It will be seen that a *cessate* grant like one *de bonis non* is to be made when administration is not complete but a *cessate* grant is a general grant whereas that *de bonis non* is of effects unadministered.

CHAPTER III

ALTERATION AND REVOCATION OF GRANTS

261. (S. 232. P. 48.) Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

The section indicates that it is where the errors are of a trivial nature or not of sufficient importance that alterations in probates will be allowed, in other cases however the grant is to be revoked (b). But the Court has possibly got wider powers than those mentioned in this section because S 263 makes the Civil Procedure Code applicable to probate proceedings and accordingly the Probate Court has powers conferred on the Civil Court by Ss 114 and 151 of that Code.

Errors in wills It has been already observed that an error in the name or description in the will may be corrected or an omission may be supplied at the time of grant of probate (Ss 76 & 77). Thus a mistake in a surname in a will may be corrected in the probate (c). A clause in a will approved by the testator cannot be excepted out of the grant (d). A mistake can be corrected or an omission supplied only if it be perfectly clear by far inference from the whole

(a) *Abbott v Abbott* 2 Phill. 578
H XIV 171

(b) *Mortimer* 491

(c) *Re Shuttleworth* 1 Curt 911 Re

(d) *Cooper* 1899 P 193
Harler v Harler 3 P & D 11
Collins v Ellstone 1893 P 1
Rhodes v Rhodes 7 A C 192

will that there is such a mistake or omission (a). Where a will has been brought to the mind of the testator it is impossible to hold that anything contained in it is a mistake, but when words were not really brought to the mind of the testator, then words proved to have been inserted in the will by mistake may be eliminated from probate (b). "The Court cannot, even by consent, order a passage of the Will to be expunged, which the testator, being of sound mind, intended to form part of it" (c). It has been held in some cases, however, that the words of a will may be struck out but new words may not be inserted (d).

Errors in Probate. This section deals with errors discovered after the grant or with the rectification of errors in probates and not with errors in wills. "Alterations have been allowed in the relationship and status of the grantees... in the character in which a person applied for a grant, where the same person was entitled under the new character ... (by) the insertion of a limitation "for the use and benefit of minors" ... In limited grants also, amendments are allowed when there has been a misdescription of the property which is to be administered, or where there has been a misrecital of the power under which a will has been made, or of a deed by which the trust has been created" (e).

Probate has accordingly been amended by inserting a fuller address of the testator than that given in the probate (f), by inserting a memorandum showing the true date of execution of a will (g), by allowing an alteration of names (h), or of words (i). An error in the printed form of the probate has been allowed to be corrected (j).

262. (S. 233. P. 49.) If, after the grant of letters of

Procedure where
codicil discovered
after grant of admin-
istration with will
annexed.

administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended accordingly.

Procedure on discovery of codicil. The case where a codicil is discovered after grant of probate of a will has been dealt with in S. 225. This section states that where letters of administration with the will annexed has been granted and

(a) *Phillips v. Chamberlaine*, 4 Ves. 51, 57; *Mellish v. Mellish*, 4 Ves. 45, 50.

(b) *Briscoe v. Baillie-Hamilton*, 1902 P. 234; see *Foulton v. Andrew*, L. R. 7 H. L. 443; *Guardhouse v. Blackburn*, 1 P. & D. 109 (rules laid down.)

(c) W. 258, 12 Ed. *Re Forrest*, 2 Sw. & Tr. 334; but see *Re Shanman*, 1 P. & D. 661; *Re Smith*, 15 P. D. 2.

(d) *Re Walkeley*, 63 L. T. 255; *Re Scott*, 1901 P. 190; *McCorrell v. Morrell*, 7 P. D. 68; *Collins v. Gilstone*, 1893 P. 1. But the contrary view has been maintained

in *Re Moore*, 1892 P. 378; *Garnett-Boltfield v. Garnett-Boltfield*, 1901 P. 335; *Gregon v. Taylor*, 1917 P. 256.

(e) Tr. & C. 278.

(f) *Re Towgood*, 2 P. & D. 408.

(g) *Re Allechin*, 1 P. & D. 664.

(h) *Re White*, 4 C. 582 ('ward' substituted for 'white'); *Re Bushell*, 13 P. D. 7 ('Bristol' substituted for 'British').

(i) *Re Huddleston*, 63 L. T. 255 (including substituted for excluding); see *Re Gordon*, 1892 P. 228; *Briscoe v. Baillie-Hamilton*, 1902 P. 234.

(j) *Gerindra v. Rajeswarl*, 27 C. 5.

subsequently a codicil is discovered, the grant of administration may be amended and altered, there will not be a fresh grant after revocation of the original grant. In England the rule is that where administration with the will annexed has been granted and a codicil is discovered, the grant must be revoked and a fresh grant is made with the will and the codicil annexed (a).

Revocation or annulment for just cause. **263. (S. 234. P. 50).** The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.—Just cause shall be deemed to exist where—

(a) the proceedings to obtain the grant were defective in substance ; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ; or

(d) the grant has become useless and inoperative through circumstances ; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations.

- (i) The Court by which the grant was made had no jurisdiction.
- (ii) The grant was made without citing parties who ought to have been cited.
- (iii) The will of which probate was obtained was forged or revoked.
- (iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.
- (v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.
- (vi) Since probate was granted, a later will has been discovered.

(vi) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.

(iii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

1. Change The words 'shall be deemed to exist where' have been substituted for the word 'is'.

2 The section The section is very comprehensive and gives very wide powers to the Probate Court to revoke a grant. A grant can be revoked not only on account of defects in the procedure but on the ground that the will itself was a forgery (a)

Proceedings under this section will lie against a probate that has issued and not against a mere order for a grant of probate, for there is no grant actually in existence in the latter case (b) Where the grant has not been issued the order granting probate being a decree has been set aside by appropriate proceedings taken under Ss 114 and 151 C.P.C. (c).

After a grant of probate or of letters of administration with the will annexed has been made the only procedure provided by the law for the revocation of such a grant is that laid down in this section. When a general grant has been made it operates upon the whole estate and it establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such (d) Such a general grant continues to be in existence until it is recalled or revoked (e). So long as probate stands, the only matter for consideration is whether a just cause for the revocation of the probate granted has been made out (f), and no question of the genuineness of a will arises for consideration till the Court has decided that the grant must be revoked on one or other of the grounds mentioned in this section (g). The only grounds on which a probate can be impeached in a Probate Court are those mentioned in this section (h), a civil suit would lie under S. 44 of the Evidence Act (i) It has been observed that what would not have furnished a ground for refusing probate can form no ground for revoking it (j). The Court has a discretion in determining whether or not to act under this

(a) *Daropti v Santhi*, 116 I C. 452.

(b) *Jamsetji v. Hirjibhai*, 37 B 158, 170-1.

(c) *Re Pitamber*, 5 B 638, *Parman v Nek Ram* 37 A 380; *Kyone v. Kyon* 3 Raog 261, see *Premsookh v Parbati*, 7 Lah 270, 94 I C. 329

(d) *Komolothan v Nilrattan*, 4 C 360; *Re Pitamber*, 5 B 638, *Sita Chandra v Bhabatarini*, 32 C.W.N 993; 114 I C. 794; see Ss 227, 273, 327

(e) *Rani Hemangini v Sarat*, 34 C.L.J 457, 459, 66 I C. 282. It is conclusive evidence, so long as it

subsists, of the proper execution of the will and of the legal character conferred on the grantee, *Daropti v Santhi*, 116 I C. 452, *Kishoribhai v. Ranchhodia* 38 B 427, 25 I. C. 37; *Venkata Ratnam v. Raja Ram*, 31 M L J 277, 35 I. C. 854

(f) *Bindaban v Sureswar*, 10 C.L.J. 263, 274; *Akhilswari v. Hart*, 40 C.L.J. 297.

(g) *Alekshadayini v Kamadhar*, 19 C.W.N 1108

(h) *Re Bhobasoodan*, 6 C 460.

(i) *Daropti v Santhi*, 116 I C. 452;

(j) *Balgangadhar v. Sakwarbi*, 26 B. 792, 797.

section (a). A grant once made ought not to be cancelled without giving notice to the party in whose favour it has been made (b). There is no specific time limit for making an application for revocation (c). If the estate has been fully administered there is no occasion for an application for revocation of a grant (d).

3. Just cause. These words, as explained in the clauses set forth in this section, are exhaustive and not illustrative (e). The Court will refuse to revoke a grant where no ground under one or other of the clauses of this section can be made out, even though the order may have been erroneous (f). Unfitness or incompetence (g) of, or maladministration by (h), an executor therefore, does not fall within the meaning of the 'just cause' as explained in this section. So also probate cannot be revoked on the ground of a will being contrary to Muhammadan law (i). In such cases, however, an application may be made under S 301 for removal of the executor. If any of the grounds mentioned in S 263 is made out in support of the application for revocation, the order for revocation should be made (j).

4. What is not just cause. Mere disagreement between administrators is not a just cause for annulling letters of administration (k). Mismanagement by an executor is not a just cause for revocation of probate, although the executor is liable for devastation under Ss 368 and 369 (l), nor is the subsequent bankruptcy of the executor (m). Letters of administration (n) or probate (o) will not be annulled on the ground that the person to whom it was granted had become morally disqualified to act. A grant of letters of administration obtained by suppressing a will containing no appointment of executor is not void *ab initio* and the sale by an administrator, so appointed, to a purchaser who is ignorant of the suppression of the will, is good, though the grant was revoked afterwards (p), but the case will be different where executors have been appointed by the will (q).

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| <p>(a) <i>Bunda v Radhica</i> 11 C. 492, <i>Komolothon v Nilutlon</i> 4 C. 360
 <i>Id.</i>, <i>Prasfullananda v Brojendra</i>, 51 I C 593 (application for revocation of letters 40 years after grant), see <i>Hemlata v Radharaman</i>, 51 I C 561</p> <p>(b) <i>Patman v Bohra Nek</i>, 37 A 380</p> <p>(c) <i>Kash v Gopi</i>, 19 C 48, <i>Shyamal v Ramswari</i> 23 C L J 82, <i>Prasfullananda v Brojendra</i> 51 I C 593</p> <p>(d) <i>Srish v Bhabafarini</i>, 32 C. W. N 993, 114 I C. 794</p> <p>(e) <i>Annoda v Kali</i>, 24 C. 95, <i>Bal Gangadhar v Sakwarbal</i>, 26 B 792, 793, <i>Subroya v Rangammall</i> 28 M 161</p> <p>(f) <i>Official Trustee v Kumudini</i>, 37 C. 387, <i>Kalimaddin v Hara</i>, 109 I C. 243</p> | <p>(g) <i>Hara Coomar v Doorgamoni</i> 21 C. 195</p> <p>(h) <i>Annoda v Kali</i>, 24 C. 95</p> <p>(i) <i>Md Renu v Sabida</i>, 23 C. W. N 658, 49 I C 128</p> <p>(j) <i>Kalimaddin v Hara Sundar</i>, 109 I C 243</p> <p>(k) <i>Gour v Saraf</i> 40 C. 50 16 C W N 880; but see <i>Surendra v Amrita</i> 23 C W. N 763, 768</p> <p>(l) <i>Annoda v Kali</i> 24 C. 95</p> <p>(m) <i>Hills v Mills</i>, 1 Salk 36 cited in <i>Re Patterson</i>, 2 C W N eccix</p> <p>(n) <i>Re Mohan v Lutichmun</i>, 6 C 11</p> <p>(o) <i>Hara Coomar v Doorgamoni</i>, 21 C. 195</p> <p>(p) <i>Boxall v Boxall</i> 27 Ch. D. 220, <i>Shallaja v Jadu</i> 19 C W N 240</p> <p>(q) <i>Gopal v Budree</i> 33 C. 657, 664, 10 C. W. N 662.</p> |
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There can be no revocation by consent of parties (a) but under English law if the consent had been given to a grant of probate upon conditions which were not complied with the grant will be revoked (b)

5 Clause (a) The illustrations mention two classes of cases as coming under this clause : (1) where the court which made the grant had no jurisdiction (c) see S 275 and (2) where the grant was made without citing parties who ought to have been cited. Decisions are numerous of the latter class

6 Citation A citation is either compulsory as under Ss 229 and 235 or discretionary as under S. 283. There are three kinds of citations (1) to accept and refuse the grant and (2) to come and see the proceedings. Another citation has been added : (3) when a caveat is filed citations will be required to be served on all persons who are next of kin or are interested in the estate (d). Where the former has been omitted the grant will be defective on the face of it and should be revoked as soon as the defect comes to the notice of the Court. Where, however, the citation is discretionary and a person who may be interested in disputing the genuineness of the will is not cited and probate is granted *ex parte*, the Court cannot say that the mere absence of the citation invalidates the grant (e). Letters of administration will also be revoked on the ground that proper citation has not been issued (f).

If a party be cognisant of the proceedings for probate or letters of administration and allow the proceedings to be concluded in his absence he will not be allowed to come in afterwards and have the grant revoked or the proceedings reopened (g) unless he is a necessary party (h).

A special citation ought to issue upon persons whose interests are directly affected by the will (i). All persons whose interests are adversely affected are entitled to notice (j). In some cases under S 283 the District Judge may if he thinks proper issue citations upon all persons whose rights are immediately affected by the will but the absence of such citation will not make the proceedings defective within the meaning of this section (k). Though probate may not be revoked because the judge in the exercise of his discretionary power under S 283 refused to have citation served upon a person it will be good ground for enquiring into

(a) *Re Hulop* 1 Rob 457, *Re Reid* 11 P D 70

(b) *Nicol v Asher* 2 Moo P C 88 W 396 12 Ed

(c) An order clearly illegal e.g., a grant of letters of administration to a part of the estate of the deceased will be revoked *Saroda v Tnguna* 46 I C 117

(d) *Vendras v Bat Champabat* 31 Bom L R 1014 122 I C 126 (many of the English citations are not known in this country)

(e) *Digambar v Narayan*, 13 Bom L R 38.

(f) *Hormusji v Bai Dhanbaji* 12 B 164 *Re Gunga*, 2 C. W N 607

Kalimaddan v Hara Sundari 109 I C 243 *Ramanandi v Kalawati* 30 Bom L R 227, 32 C W N 402 P C.

(g) *Dwijendra v Golok* 21 C. L J 287 (see cases cited to) *Kanhai v Jogendra* 1 Pat 86 *Sadasal v Gadari* 35 C. W N 58.

(h) *Manorama v Shita* 42 C 480

(i) *Re Huma Lall* 8 C 570

(j) *Dwijendra v Golok* 19 C. W N 747 28 I C 574

(k) *Nalanny v Sarasaty* 18 C 45 (old in *Sadasal v Gadari* 35 C. W N 58 131 I C 856 *Re Huma Lall* 8 C 570

the genuineness of the will (a) But probate granted without citing the heir at law is liable to be revoked (b), and he can call upon the executors to prove the will in solemn form in his presence (c) Citation should also issue on a reversionary heir (d), or the next of kin or legatee (e), even if he be before the Court in another capacity If a will be proved in common form without citing the next reversioner and the executor refuses to prove the will in solemn form, probate will be revoked Those who prove the will in common form do so at their risk namely, of having the grant set aside (f) There is a distinction between cases of wills and cases of intestacy in the matter of citations The omission to cite in the former case prejudicially affects the rights of persons to properties which they would be entitled to inherit in the absence of the will, while in the latter class of cases such omission only affects their preferential right to administer the estate or prevents them from objecting to the personnel of the administrator Therefore in the case of a grant of letters of administration, the letters will not be necessarily revoked because of the omission to issue citations to certain parties who were interested (g).

A party cannot apply for revocation who had been served with citation or had been cognisant of the probate proceedings and did not oppose the grant (h) but this rule does not apply where the interest of a minor is affected (i), unless there was fraud or collusion on the part of the guardian or discovery after grant of probate that the will was not genuine (j), or perhaps there was gross negligence by the guardian (k)

A proceeding is defective under the first clause where the statement as to the relations of the deceased is incorrectly given so as to mislead the Court and thereby prevent it from directing the issue of citations on them (l)

7 Citation where minors are concerned The object of citation is that all persons whose interests are or may be adversely affected by the sentence of the Probate Court shall have notice of the proceedings and an opportunity of intervening for the protection of their interest This purpose is not achieved by the issue of citations to infants without having guardians *ad litem* appointed (m)

- (a) *Digambar v Narayan* 13 Bom L R 38
- (b) *Re Amrita* 27 C 350 *Komona v Hurrolall*, 8 C 570
- (c) *Brinda v Radhika*, 11 C 492, *Komolochan v Nilrattan*, 4 C 360, *Rebells v Rebells*, 2 C W N 100, *Re Harendra* 6 C W N 383 (argument of counsel) That question will not be decided in this application, *Glokeshi v Hurry* 30 C 528 7 C W. N 450
- (d) *Shyama v Prafulla*, 21 C. L. J 557, 19 C W N 882
- (e) *Emberley v Trecoaman*, 4 Sw & Tr 197
- (f) *Re Gopi*, 5 C. L. J 560
- (g) *Ranmoy v Betty* 31 C. W. N 160, 100 1 C 177
- (h) *Brinda v Radhika* 11 C 492, *Prem Chand v Surendra*, 9 C W.

- N 190, *Kanhai v Jogendra*, 1 Pat 86, 69 1 C 611
- (i) *Dwijendra v Golok*, 21 C L J 287, *Shoroshibala v Anandamoyee* 12 C W N 6, but see *Brinda v Radhika* 11 C 492, *Nislatiny v Brahmamoyi* 18 C 45 (see cases cited), *Re Bhuggobutty*, 27 C 927, 4 C W N 757
- (j) *Nislatiny v Brahmamoyi*, 18 C 45
- (k) *Lalla Sheo v Ramnandan* 22 C 8, *Cursandas v Ladakvahu* 19 B 571
- (l) *Shyama v Prafulla*, 19 C W N 882
- (m) *Dwijendra v Golok* 21 C L J 287, 19 C W N 747, *Shoroshibala v Anandamoyee* 12 C W N 6, *Rebells v Rebells* 2 C W. N 100

It is also the duty of the person appointing the guardian to see that the guardian accepts the appointment and takes upon himself the burden thereof (a) It is always open to a minor to repudiate the act of his guardian if it can be shown that the act was clearly illegal (b) Upon an application for probate the citation must be properly served and where the interest of a minor is affected, the prudent course is for the propounder to have the will proved *per testes* in the presence of an independent guardian *ad litem* appointed for the minor (c) But where a person who is named as the guardian *ad litem* of a minor appears and takes part in the proceedings and properly looks after the interest of the minor, the minor has been held to have been effectively represented though there was no formal order appointing such person as the guardian *ad litem* of the minor (d) If a will be admitted to probate without an infant being cited, this will be just cause for revocation on his attaining age, when he will be entitled to require the executor to prove the will in his presence (e) Infants who are reversionary heirs are entitled to special citation (f) The infant ought to be represented by a guardian *ad litem* and citation served upon such guardian (g) Infants who have no interests in the estate are not entitled to apply for revocation because they have not been served with citations (h)

8 Common and solemn forms A probate in common form is issued where the validity of a will is not contested or questioned The executor proves the will, in the absence of the parties interested upon his oath or upon such further evidence as may be required Probate in solemn form is obtained by the executor in an action in which the persons prejudiced by it have been made parties and the Court upon hearing the evidence pronounces for the validity of the will (i) Probate granted in common form is final unless it be challenged under this section and ordinarily it should be proved afresh at the request of a party interested, but not where the party had been aware of the proceeding and had abstained from coming forward (j) Therefore it is at the instance of parties, who have not appeared and have not been cited that a grant will be revoked under this section if just cause be shown (k), except under exceptional circumstances (l)

- (a) *Sachindra v Hironmoyee* 24 C W N 538, but see *Radhashyam v Ranga*, 24 C W N 541
 (b) *Sarada v Triguna* 46 I C 117 3 Pat. L J 415
 (c) *Ramanandi v Kalawati*, 7 Pat. 221, 32 C W N 402 P C.
 (d) *Ranmoy v Betty* 31 C. W N 160 100 I C 177
 (e) *Rebells v Rebells*, 2 C. W. N 100, *Re Gopi*, 5 C. L. J 560, *Harl v Basanta*, 14 C. W N 171; *Brindaban v Sureswar*, 10 C. L. J 263, *Azimunnisa v Sirdar Ali* 29 Bom L R 434
 (f) *Akhleswar v Harl*, 40 C. L. J 297, 84 I C. 689
 (g) *Brindaban v Sureswar* 10 C. L. J 263, 274, *Dhruendra v Goloke* 19 C. W N 747, but see

- Radhashyam v Ranga* 24 C. W N 541, 59 I C. 654, *Naba Gopal v Sri Gopal*, 23 C. L. J 79, 33 I C. 14
 (h) *Bilhal v Pan Kuer*, 125 I C 774
 (i) *Phanindra v Nagendra* 39 C. L. J 569, 84 I C. 65
 (j) *Binda v Radhika*, 11 C. 492, *Ratelje v Barnes* 2 Sw & Tr 486 fold, *Re Pstamber* 5 B 635, *Nisfaring v Brahmanoyt*, 10 C 45, *Hyscherley v Andrews* 2 P & D 327
 (k) *Nobeen v Bhadossonjuri* 6 C. 469
 (l) *Re Bhuggoluty* 27 C. 927, 4 C. W N 257, *M 761 I a*, see *Pratunanda v Dhirendra* 31 I C. 593

A probate granted in solemn form is binding not only on parties but on privies that is, persons who are cognisant of the proceedings (a) Such a grant has been declared to be irrevocable, (i) where all the parties adversely affected by it have been parties or privies to the proceeding in which it was granted (ii) where such proceeding was quite legal and fair—free from anything fraudulent and collusive, and (iii) where there is no later will (b) If the will has been proved in common form in all ordinary cases the Judge should have the will proved afresh, but if there had been full enquiry as to the genuineness of the will the Judge should take the previous grant of probate as *prima facie* evidence of the will and shift the onus on the objector (c)

Although, following the English practice, a distinction has been drawn between probates granted in common form and those in solemn form it should be noted that according to the law in India there is no distinction between proving a will in common form and in solemn form (d) S 283 lays down the same procedure for the grant of probate in all cases whether contested or uncontested The view taken of S 295 in *Komolothun v Nilruttun* (e) has not been followed in *Pratap v Kalibhangan* (f) The Act nowhere provides that in case of a grant in common form or in uncontested cases any person having interest can claim to have the will proved again in solemn form and that if the executor fail to prove it in solemn form the grant in common form is to be revoked All that the decided cases lay down is that non citation may be a just cause for revocation of a grant (g) There may be a certain degree of similarity between a grant in common form and a grant in solemn form on the one hand and a grant in uncontested cases and in contested cases on the other, as has been observed in *Rebells v Rebells* (h) but the Act does not recognise the distinction in express terms According to the practice of the Calcutta High Court probate is granted in common form without citation, but applicants follow this procedure and at their risk, viz, at the risk of having the proceeding set aside at the instance of parties who are entitled to be heard but have not been heard (i)

9 Clause (a) Alienees since the probate are not necessary parties to a proceeding for revocation of the probate on the ground of the probate proceedings being defective in substance (j)

10 Clause (b) Fraudulently means knowingly and with the intention of deceiving the Court and so differs from the next clause by the fact that there the allegation is made in ignorance In the one case the statement is willfully false, in the other innocently so The expression, making a false

- (a) *Kunja v Kailash* 14 C W N 1068, *Wylcherley v Andrews*, 2 P & D 327, *Young v Holloway* 1895 P 87 *Re Pitamber* 5 B 638, *Kurruttulain v Abbas Hossain* 33 C 116
(b) M 701, *Mortimer* 424 See *Re Pitamber* 5 B 638
(c) *Komolothun v Nilruttun* 4 C 360
(d) See *Ramanandi v Kalawati*, 7

- Pat 221, 107 I C 14 P. C
(e) 4 C 360
(f) 4 C W N 600 601
(g) *Rebells v Rebells* 2 C. W. N 100, *Gilokeshi v Hurry*, 7 C. W N 450
(h) 2 C W N 100
(i) *Re Gopi* 5 C L J 560
(j) *Haimabati v Kunja Mohon* 35 C W N 387

suggestion or representation, is sufficient to cover a case in which it is alleged that the will of the testator is a forged document (a)

The following illustrations are given in Tristram and Coote (b) —(1) Probate granted of a forged or revoked will, or (2) while a suit touching the validity of the will is pending in another Court, *eg*, about the testator's domicile (c), or (3) to a minor executor who does not disclose the fact, or (4) of a will of a person who is alive (d), or letters of administration granted to a man who was not legally married to the deceased (e), or (5) to next of kin who are not so or are illegitimate relations (f)

Where notice was served in probate proceedings upon a party who had assigned his interest to another, non-disclosure of this fact has been held to be a ground for revocation under this clause if not under cl (a) (g) Where administration has been granted with the consent of the caveator, which consent, however, was obtained by means of fraud (h), or where the grant of letters of administration was obtained by a person as attorney for a fictitious person, the grant, in either case will be revoked and the sureties of the administrator in the latter case will be liable for sums misappropriated by him (i)

11. Clause (c) This clause contemplates a case where the discovery is made after the grant which is, therefore, obtained on an allegation which is untrue but made in ignorance or inadvertently (j)

The following illustrations are given in Tristram and Coote —(1) where a will was discovered after grant, (2) or a later will after grant of probate of an earlier one, (3) or codicils discovered after the grant of probate of a will, which revoke or add to the appointment of executor under the will, (4) where the Court of Chancery, on construction of a will found a person entitled to probate other than the one to whom it has been granted the grant should be revoked and a fresh grant should be made to the person held entitled by the Court of Chancery (k), or (5) where a grant was made to the elected guardian of infants where they had testamentary guardians (l), (6) or where letters of administration with the will annexed have been issued upon the renunciation of an executor who had previously intermeddled in the estate of the testator and who has been afterwards compelled by the Court to take probate Where letters of administration were granted to a brother of a deceased on the allegation that they were joint, the

(a) *Re Mohendra*, 5 C. W. N. 377, 381, *Khirodmoyt v Bagala*, 4 C. L. J. 492

(b) 286 290

(c) *Trimelstoun v Trimelstoun*, 3 Hag 243

(d) *Re Napier* 1 Phill 83

(e) *Re Moore*, 3 No. of Cas. 601

(f) *Re Bergman* 2 No. of Cas. 22 W. 397 12 Ed

(g) *Mokshadayini v Karnadhar* 19 C. W. N. 1108

(h) *Kalyani v Mukunda*, 3 C. L. J. 37 n.

(i) *Debendia v Adm Genl*, 35 1 A.

109 35 C. 955 on app. from 33 C. 713

(j) The allegation that letters of administration have been obtained upon misrepresentation of fact does not amount to fraud as contemplated by S. 44 of the Evidence Act and therefore on such an allegation a party is not entitled to bring a suit in a civil court. *Ambica v Kala*, 10 C. W. N. 422, see *Gopal v Badree*, 33 C. 657, 10 C. W. N. 662.

(k) *Warren v Kelton*, 28 L. J. 122

(l) *Re Morris*, 2 Sw & Tr. 360

grant was revoked and a fresh grant made to the widow on her allegation that they were separate and she was held entitled to the same as the heir (a) Where after the grant of letters of administration by the District Judge property of the deceased outside the jurisdiction of the Court was discovered, the High Court granted fresh letters of administration after the previous grant was revoked (b) A grant of letters of administration obtained by suppressing a will which appointed an executor is void *ab initio* (c).

Errors which may be rectified under S. 261 do not furnish grounds for revocation of probate nor errors which are immaterial (d)

12 Clause (d) The following illustrations are given in Tristram and Coote —(1) The grantee dies before the order making the grant is completed (2) Where one of two executors who prove a will becomes insane, probate is revoked and a new grant is made to the sane executor, 'power being reserved to the lunatic of taking probate again on recovering his reason (e) (3) Where administration with the will annexed is given to residuary legatees one of whom afterwards becomes insane (f) (4) Where one of two administrators becomes insane (g) (5) Where the grantee of a limited grant assigns his interest *e.g.*, a tenant for life of a certain fund after taking a limited administration assigned his interest to the remainderman the court revoked the grant and made a limited grant to the remainderman (h) (6) A creditor who takes out a grant of administration and after paying his own debt leaves the country (i) or wishes to be relieved of the administration of the estate (j), the grant is revoked and a grant *de bonis non* is made (7) When the grantee leaves the estate unadministered (k)

The words 'useless and inoperative', it has been pointed out (l), are explained in the illustrations attached to the section, apparently referring to illustrations (vi) and (viii), but illust (vii) has been placed under clause (c) by Messrs Tristram and Coote These words imply the discovery of something which if known at the date of the grant, would have been a ground of refusing it, *e.g.*, the discovery of a later will or codicil or the subsequent discovery that the will was forged or that the alleged testator was still living (m) But the clause is not confined to cases where the circumstances though subsequently discovered were in existence at the date of the grant but unknown to the parties at the time It extends to cases where the circumstances contemplated have happened since the time of the grant This is made clear by illust (viii) but it appears to have been overlooked in the two cases cited above (n) Where the executor or administrator would not

- (a) *Kulbantla v Bahadoor Hazam*, 3 C W N cclxxvii
 (b) *Re Rose* 25 A 355
 (c) *Gillis v Gillis* (1905) 1 Ch 613
Debendra v Adm Genl, 35 C 955 P C
 (d) *Mana Abu v Bee Bee*, 88 I C 614
 (e) *Re Sowerby*, 65 L T 764 *Re Shaw* 1905 P 92 W 365 12 Ed
 (f) *Re Phillips*, 2 Add 335
 (g) *Re Phillips* 2 Add 335, *Re Newton* 3 Curt 428

- (h) *Re Fenter*, 1 Hag 241 W 397 12 Ed
 (i) *Re Jenkins* 3 Phill 33
 (j) *Re Hoare* 2 Sw & Tr 361 n
 (k) *Re Covell* 15 P D 8, *Re Bradshaw*, 13 P D 18, *Re Loedday*, 1900 P 154, *Re Thomas* 1912 P 177
 (l) *Annada v Kall*, 24 C 95
 (m) *Bal Gangadhar v Sakwardai* 26 B 792 *reld to in Gour v Saraf* 40 C 50 16 C W N 880
 (n) *Surendra v Amrita* 23 C W N 763 768 (see English cases cited)

or did not administer the estate the Court would revoke the grant and make a fresh grant as the previous grant had turned out 'abortive and inefficient', for 'after all the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto' (a) This view was negatived in *Gour v Sarat* (b), where deadlock or maladministration was held to be no justification or just cause for revocation of a grant for it was there laid down that the clause contemplated a case where there was an administrator who was incapable of acting, so that the estate was practically without an administrator, and not a case where there was an administrator but he was wilfully withholding the legacies payable under the will But in view of the decision in *Surendra v Amrita* (c) the case of *re Loveday* (d) may be regarded as having weight in this country Of course an executor or administrator who refuses to administer may be removed by the Court if an administration suit be brought and a proper case be made out The Court has inherent powers under S 151 C P C to make such orders as may be necessary in the ends of justice (e) See also S 301 Conviction of an administrator of criminal offence has been held to be a just cause for revocation (f) Under S 34 of the Mortgagees and Trustees Act (XXVIII of 1866) a trustee may be removed when he becomes incapable or unfit A grant does not become useless and inoperative because the administrator has nothing further to do than distribute the legacies (g), or has still some duties to perform (h)

13 Clause (e) This clause was added by Act VI of 1889 to the Probate and Administration Act A mere omission to submit an account or file an inventory has been held to be no ground for revocation of probate (i) The omission must be wilful or accompanied by mismanagement of the property (j), or without reasonable cause (k) As regards inventory or account it is not sufficient that it should be incorrect it must be untrue in material particulars (l)

The account required to be exhibited by this section is one contemplated by S 317, therefore untrue accounts for a period antecedent to the final grant of probate is not covered by this section Moreover the objections to the portion of the account alleged to be untrue must be specifically and precisely formulated (m)

(a) *Re Loveday* 1900 P 154, fold in *Surendra v Amrita* 47 C 115 123 23 C. W N 763

(b) 40 C. 50 16 C W N 880, see *Shish v Bhabafarini* 32 C W N 993 114 I C. 794 (the remedy of a legatee to obtain the legacy is either by a suit for the legacy or for administration of the estate)

(c) 47 C 115 23 C. W N 763

(d) 1900 P 154

(e) *Parman v Bohra Nek* 37 A. 380

(f) *Re Patterson* 2 C W N ccas

(g) *Rabindra v Jogendra*, 56 C. 432, 114 I C. 796.

(h) *Chandra v Prasanna* 25 C W N,

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(i) *Premchand v Surendra* 9 C. W N 190

(j) *Bal Gangadhar v Sakwarbal*, 26 B 792 *Maddali v Velampalli*, 34 I C 435

(k) *Prem Chand v Surendra* 9 C. W N 190 *Hemlata v Radharaman* 51 L C. 561 *Maddali v Velampalli*, 34 I C. 435

(l) *Gokuldas v Punshottam* 4 Bom L. R. 979

(m) *Chandra v Prasanna* 48 C. 1051, see *Sarat v Uma Prasad* 31 C 628

14. Probate granted as the result of a compromise Probate granted in common form is binding on parties and privies but not on privies where the compromise has been entered into without notice to them nor will it be binding on infants, nor can such a probate be set aside except on proof of fraud practised upon parties or upon Court (a) A compromise is binding on the party before sentence is pronounced by the Probate Court (b) but not in the course of appeal proceedings after a will has once been declared to be a forgery A compromise will not affect strangers to the proceedings A caveator may withdraw his objection upon compromise in revocation proceedings (c) The Court will not recognise any compromise of an action of which it is entirely unacquainted or if one of the terms of the compromise be a clear violation of a statutory right (d)

15 Jurisdiction This term is used in various senses, *e.g.*, as meaning the local or pecuniary jurisdiction of the Court or its jurisdiction with reference to the subject matter of the suit or as meaning the legal authority to do certain things (e), *i.e.*, the authority to hear and determine a cause (f) With regard to local jurisdiction the test to be made use of in applications for grant of probate may, in the absence of express provision, be applied to cases in which revocation for probate is demanded Thus when the Pabna Court was removed from the jurisdiction of the Rajshaye Court if the deceased had his fixed place of abode or some property in the jurisdiction of the newly set up Pabna Court that Court has jurisdiction to entertain an application for revocation of probate even though the probate had been granted by the Rajshaye Court before the Pabna Court was set up (g) An additional District Judge to whom such functions have been assigned may revoke a grant made by the District Judge It is not the law that the District Judge who grants probate has alone the power of revoking the same though the general rule is that the Court which grants probate has power to revoke it (h)

The revocation proceedings must be initiated in the Court which issued the grant sitting as a Court of Probate and not in the exercise of its ordinary civil jurisdiction It would lead to the greatest confusion if the validity of the will could be questioned in a civil suit after the grant of probate (i) unless the revocation is sought on grounds mentioned in S 44 of the Evidence Act and not on those mentioned in this section (j) Hence a grant cannot be set aside in an ordinary civil suit except for fraud or want of jurisdiction but can be revoked only by

- (a) *Nicol v Askew* 2 Moo P C C 88 cited in *Kunja v Kallash* 14 C W N 1068, *Norman v Strains* 6 P D 219
 (b) *Hargreaves v Wood* 2 Sw & Tr 602, *Road Night v Carter* 3 Sw & Tr 421 *Wylderley v Andrews* 2 P & D 327
 (c) *Saroda v Gobinda* 12 C L J 91
 (d) *Sakhl v Ram Kishun* 55 I C

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 (e) *Mohesh v Jahiruddl* 5 C W N 507
 (f) *Golap v Indra* 9 C L J 367, 374
 (g) *Re Hurro Lall* 8 C. 570
 (h) *Daha Kuer v Tural Del* 3 Pat 609, 78 I C 701
 (i) *Komollochun v Nilrutton* 4 C 360
 (j) *Nobeen v Bhobasoondari* 6 C 460

the Court which issued the grant under its probate jurisdiction (a) The High Court has concurrent jurisdiction in the exercise of all the powers conferred upon the District Judge (S 300).

16. *Res Judicata*. Any order passed after contention in a probate proceeding is *res judicata* in any subsequent proceeding of any sort between the same parties (b) Even if a party be cognisant of the proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence he will not be allowed afterwards to come in and have the grant revoked or the proceedings reopened (c) An order refusing to grant probate has been set aside by suit in a civil Court in a case whether the Hindu Wills Act did not apply (d) S 41 of the Evidence Act has been held not applicable to the judgment of a Probate Court refusing probate but it operates as *res judicata* between the actual parties in the Probate Court Matters which are outside the scope of a Probate Court are not barred by a sentence of the Probate Court, *eg*, questions of construction of a will or of the rights of certain persons to inheritance or to property left by the will, or the right to be appointed a *shebait* The decree in such suit will supersede the grant (e) A person who applied for revocation of probate on the ground that the will was forged and the application was dismissed and who did not appeal from that order was not allowed to raise the same plea in a Sub Judge's Court which had no jurisdiction in probate matters (f) An unsuccessful application for revocation on the ground of maladministration of the estate does not bar by constructive *res judicata* a subsequent application for revocation on the ground of forgery of the will (g). A decision in a proceeding for revocation commenced by a female reversionary heir is binding upon the actual reversionary heir after her death (h).

17. *Review* It may be right in a fit case to allow a review (i)

- (a) *Re Havendra*, 5 C W N 383, following *Komolochun v Nilrutton*, 4 C. 360, *Annada v Atul* 31 C. L. J. 3, 24 C W N 465, *Mahomed v Sobida*, 29 C L J 37 (Probate Court cannot revoke a grant on the ground of will being contrary to Mahamedan law), *Rallabandy v Yanamandra* 45 M. L. J 383, 79 I C. 44
- (b) *Rallabandy v Yanamandra* 46 M. L. J 383, *Abdul v Maung Min*, 51 I C. 355 (interest negatived in administration suit held to be a bar to an application for revocation), *Dwijapada v Kalpada*, 46 C. L. J 596 (decision in a Probate Court that A was the son of B was *res judicata* in a subsequent suit in a civil court). Dismissal of a petition for probate as the result of compromise between the parties

- no bar to a fresh application (9 years later), *Biojola v Sharajubala*, 84 I C 154
- (c) *Rallabandy v Yanamandra*, 46 M. L. J 383, *Dwijendra v Goloke*, 21 C. L. J 287, 19 C W. N 747
- (d) *Ganesh v Ram*, 21 B 563
- (e) *Jagannath v Runjit*, 25 C. 354, 369, *Arunmoyl v Mohendra*, 20 C. 888, *Rajendra v Manick*, 8 A. L. J 1063, 1069 But see *Dwijapada v Kalpada*, 46 C. L. J 596
- (f) *Kishorhal v Ranchod* 38 B 427, 16 Bom L. R. 459
- (g) *Khindamoyl v Bagela*, 4 C. L. J 492.
- (h) *Dargagati v. Saurahini*, 33 C 1001, 1009
- (i) *Re Pitamber* 5 B. 633; *v. Agoré Soon*, 91 I. C.

18. Appeal. No appeal lies from an order that a person has *locus standi* to contest a will, the order being interlocutory (a), nor from an order revoking a grant on the ground that the order was improperly made (b).

19. What entitles one to apply for revocation. In order to be entitled to apply for revocation a person must have interest in the property of the deceased. "Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper" (c). Before a person therefore can be permitted to contest a will, the party propounding it has a right to call upon him to show that he has some interest (d). The interest of the party contesting a will must be derived from the deceased by inheritance or otherwise to some portion of the estate of the deceased. A person simply disputing the right of the testator to deal with property as his own has not sufficient interest to entitle him to oppose the grant. In other words, it is a person deducing his title from the testator, and not claiming adversely to or independent of the testator, that is entitled to apply for revocation of the grant (e). The test that has been proposed in *Nobeen v. Bhobosoonduri* (f) is whether the person can show that he is entitled to maintain a suit in respect of the property over which the probate will have effect, but this view has been dissented from (g). A person who is not the next of kin and has no interest in the estate of the testator has no right to oppose the grant of probate or dispute the validity of the will (h). If a person has the right to enter a caveat regarding the grant of probate, he can, on similar grounds, apply for revocation of the order granting probate of the will (i). An interest acquired subsequent to the death of the testator is sufficient (j), but the subsistence of an interest is essential (k). There must be a possibility of having an interest in the result of setting aside the will and not the possibility of filling a character which would give the party concerned an interest. The foundation of title to be a party to a probate or administration action is interest (l). Proof of a former will of the testator in which the defendant (a debtor and legatee) is interested is a sufficient interest to contest the will (m).

(a) *Lakht v. Multan*, 16 C. W. N. 1099, see S. 209.

(b) *Bulakt v. Shambu*, 6 Lah. 180.

(c) *W; Crispin v. Dogliont*, 2 Sw. & Tr. 17; *Dixon v. Allison*, 3 Sw. & Tr. 572, cited in *Rahamatullah v. Rama Rau*, 17 M. 373; *Lindsay v. Lindsay*, 42 L. J. P. 32; *Shorashibala v. Anandamoyee*, 12 C. W. N. 6.

(d) *Hingston v. Tucker*, 2 Sw. & Tr. 596 cited in *Rahamatullah v. Rama Rau*, 17 M. 373.

(e) *Abhitram v. Gopal*, 17 C. 48; *Re Hurrolal*, 8 C. 570 distd. from; *Behary v. Juggomohun* 4 C. 1 fold; *Sirgobind v. Laljhari*, 14 C. W. N. 119; *Bahisab v. Gangasagar*, 1 C. L. J. 259; *Pirojshah v. Pestonji*,

34 B. 459, 12 Bom. L. R. 366.
(f) 6 C. 460.

(g) *Abhitram v. Gopal*, 17 C. 48. No opinion expressed in *Brindaban v. Sureswar*, 10 C. L. J. 263.

(h) *Re Alice Tsee*, 15 W. R. 351.

(i) *Umanath v. Nilmoney*, 6 C. 429; *Re Hurrolal*, 8 C. 570, 575.

(j) *Lindsay v. Lindsay*, 42 L. J. P. 32; *Mokshodayini v. Karnadhar*, 19 C. W. N. 1108.

(k) *Baljnath v. Deshputti*, 2 C. 208; *Komolochun v. Nitrallon*, 4 C. 360; *Re Hurrolal*, 8 C. 570; *Nilmoney v. Umanath*, 10 C. 19, 28.

(l) *Critpn v. Dogliont*, 2 Sw. & Tr. 17.

(m) *Rahmatullah v Rama Rau*, 17 M. 373 (see cases cited).

20 Who can apply An immediate reversionary heir, although he has no present interest in the property left by the deceased, is substantially interested in the protection or devolution of the estate to be entitled to appear in proceedings for grant or revocation of probate (a). But the reversionary heir must have an interest in the estate of the deceased, thus the reversionary heir of the husband is not entitled to apply for revocation of probate because his claim is outside and independent of the will (b). Where the immediate reversioner has rendered it impossible for herself by her conduct to maintain an application for revocation, the application may be made by a remote reversioner and, it seems, generally, even in the absence of the disqualification of the immediate reversioner, a reversioner in the second or third degree is entitled to apply for revocation (c). A reversioner, who is a minor at the time of the grant, is not estopped from making an application for revocation, because at the time of the grant his natural guardian did not intervene on his behalf (d).

A testator's daughter (e) or widow (although there are sons living) (f) has sufficient interest to file a caveat or apply for revocation but not a predeceased son's widow (g) nor the widow of the adoptive father of the testator (h).

A mortgagee of the estate of a deceased person has sufficient interest (i), particularly where the further ground is taken that the will set up is a forgery and is a fraud upon him (j). A purchaser of property from the heir of a deceased person or an assignee is entitled to apply for revocation (k), so also a person who has entered into a contract with the heir to buy his property and has paid the greater part of the purchase money (l).

The executor of a later will is entitled in the same way as the next of kin to call upon the executor of a prior will to prove in solemn form and to cross examine witnesses (m), a legatee under an earlier will can apply for revocation of probate of a later will by which his legacy has been cut down (n).

- (a) *Brindaban v Sureswar*, 10 C. L. J. 263, relating to *Re Hurro Lall*, 21 C. 570; *Khetramoni v Shyama*, 21 C. 539; *Bepin v Manoda*, 6 C. W. N. 912; *Re Gopi* 5 C. L. J. 560; *Shama v Khetramoni*, 27 C. 521 P. C.; *Shyama v Prafulla*, 19 C. W. N. 892.
- (b) *Baislab v Ganga*, 1 C. L. J. 258.
- (c) *Haridas v Bidhumukhi*, 35 C. L. J. 66, 68 I. C. 795, see *Salindra v Satala* 27 C. L. J. 320; *Khetramoni v Shyama*, 21 C. 539 (where the immediate reversioner was suspected of colluding with the applicant for probate); *Abinash v Harinath*, 32 C. 62.
- (d) *Haridas v Bidhumukhi*, 35 C. L. J. 66, 68 I. C. 795.
- (e) *Khetramoni v Shyama*, 21 C. 539.
- (f) *Re Gobinda*, 17 C. W. N. 1141; *Brinda v Radhica* 11 C. 492,

- Re Amrita* 27 C. 350.
- (g) *Re Gobinda* 17 C. W. N. 1141.
- (h) *Garabini v Pratap*, 4 C. W. N. 602.
- (i) *Lindsey v Lindsey*, 21 W. R. 272 fold. in *Kasht v Gopi* 19 C. 43.
- (j) *Subomongala v Sashibhooshun*, 10 C. 413; *Umanath v Nilmony*, 10 I. A. 80, 10 C. 19 fold.
- (k) *Lalit v Navadip*, 28 C. 587; *Muddun v Kali*, 20 C. 37; *Komolochun v Nilrutton* 4 C. 360; *Digamber v Narayan*, 13 Bom. L. R. 38; *Cross v Cross* 3 Sw. & Tr. 292; *Sheikh Azim v Chandra*, 8 C. W. N. 748; *Mokshadayini v Kamadhar* 33 C. 1001, 19 C. W. N. 1108.
- (l) *Muddun v Kali* 20 C. 37.
- (m) *Re Tararam* 25 C. 553.
- (n) *Draupadi v Rajkumari*, 22 C. W. N. 564, 45 I. C. 760.

An attaching creditor has been held entitled to apply for revocation of probate (a) but the Privy Council have observed that 'they entertain grave doubts whether an attaching creditor can do so (oppose a grant) at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors (b) Creditors of a son who by the will had been deprived of a large share of his inheritance by the will of his father, were held entitled to apply for revocation on the ground that the probate had been obtained in fraud of creditors (c) The Privy Council have declared (d) that the creditors of the next of kin of the testator where the testator has left a son were not parties having interest in the estate of the deceased and were not entitled to oppose the grant Under the present English law a creditor though he may not be entitled to the new grant, may apply for revocation (e) A person interested by assignment in the estate of the deceased is entitled to apply for revocation (f)

A person who is entitled to an interest under a will which is alleged to be wholly or partly revoked by a second will has *locus standi* as having sufficient interest to oppose the grant of probate and to apply for revocation of the later will on the ground of non service of citation (g) When a person dies without any heir the government has a *locus standi* but as soon as it appears that there are heirs in existence the government ought to retire (h) The general rule has been thus stated (i) any person who on revocation of the grant is entitled to it may apply The applicant must look for and be prepared to take the new grant when he applies for revocation of the old grant (j) Two exceptions are recognised (i) the grantee himself may apply or (ii) a creditor (l) though neither may be entitled to the grant

21 Who cannot apply An illegitimate son of a Sudra (l) a remoter heir where there is a preferential heir (m) a testator's creditor (n) a predeceased son's widow (o) a person who does not claim any part of the property of the deceased by inheritance or otherwise but claims it on an adverse title to the deceased (p) is not entitled to apply for revocation of probate A member of the husband's

- (a) *Re Bhobosoondur* 6 C 460 *Umanath v Nilmoney* 6 C 429 (but doubted on appeal) 10 I A 80 10 C 19
 (b) *Nilmoney v Umanath* 10 C 19 28
 (c) *Lalji v Multan* 17 C L J 230 16 C W N 1199 *Nilmoni v Umanath* 10 I A 80 10 C 19 *Sekh Azim v Chandra* 8 C W N 749 *Istien v Satyendra* 28 C 441 *Arahal v Narayana* 34 M 405
 (d) *Balunath v Desputty* 2 C 208 25 W P 489 see *Nilmoni v Umanath* 10 I A 80 10 C 19 expld in *Surbomongola v Sasli Bhooshun* 10 C 413 *Kishen v Satyendra* 28 C 441 *Lalji v Multan* 17 C L J 230 16 C W N 1099

- (e) *Re French* 1910 P 169
 (f) *Moksladayin v Karnadkar* 19 C W N 1108 31 I C 702
 (g) *Daupadi v Rajkumari* 22 C W N 564
 (h) *Rama Nath v Collector &c* 29 I C 682
 (i) *Tr & C* 290
 (j) *Phillips v Alcock* 2 Lee 93
 (k) *Re French* 1910 P 169
 (l) *Re Sarat* 2 C W N cclvi but see *Rajant v Nilal* 25 C W N 433 I B
 (m) *Shashi v Rajendra* 40 C 82
 (n) *Rahamatulla v Rama Rau* 17 M 373
 (o) *Re Gobinda* 17 C W N 1141
 (p) *Abhiram v Gopal* 17 C 49 1041 in *Pi ojal v Peshonji* 34 B 459

family of a woman who took to the life of a prostitute was held not to have any interest in her estate because the tie of kindred was severed on her degradation (a) but prostitution has since been held not to sever the tie (b) A surety of an administrator is not entitled to apply for revocation (c) One of several executors all whom have obtained probate has no *locus standi* for whatever interest he has has been derived from the will he therefore cannot challenge the will (d) unless he be also the next of kin (e) Such an executor can apply to have his name struck out (f)

22 Limitation The law of limitation does not govern the application for probate (g) Applications for revocation of probate or letters of administration do not fall within the provisions of art 178 of the Limitation Act (XV of 1877) (h) Though an application for revocation is not barred by lapse of time yet the petitioner must show good reason why he did not proceed at an earlier period (i) An application for revocation made long after the grant makes it difficult for the defendant to prove his case (j)

23 Acquiescence Although an application for revocation does not become barred by limitation it may be lost by acquiescence Thus when an application was made 12 years after obtaining probate it was refused on among other grounds of delay and of the consequent difficulty of establishing a will so long after execution (k) Acceptance of benefit under the will may amount to a waiver and estoppel a party from making an application for revocation (l) But there can be no acquiescence without full knowledge of both of the right infringed and of the acts which constitute the infringement Similarly waiver must be an intentional act with knowledge of the facts of the case (m) Where a party has knowledge and has acquiesced in the grant of probate delay in applying for revocation will be a bar unless the applicant shows some reasonable and true

(a) *Re Kam nemoney* 21 C 697 fold in *Bhutnail v S S for Inda* 10 C W N 1085

(b) *Hiralal v Tripura* 40 C. 650 F B *Narain v Tirlok* 29 A 4 3 A L J 537 *Subba aya v Ramasami* 23 M 171

(c) *Gany v Omer* 61 I C 563

(d) *Re Chamberlain* 1 P & D 316 *Srinath v Mukundram* 12 C W N 573

(e) *Williams v Evans* 1911 P 175

(f) *Srinath v Mukundram* 12 C. W N 573

(g) *Re Ishan* 6 C. 707 see *Dayabhat v Damodaras* 20 B 277 21 B 75 *Durgagall v Saubini* 33 C 1001 1007 10 C W N 955 *Empress v Ajudhia* 10 A. 350 *Janaki v Kesavalu* 8 M 207 *Gnanamuthu v Vasaikoll* 17 M 319 *Thiruengada v Mahomed* 9 M. L.

J 382 *Adwally v Krishnadhane* 42 I C. 933 21 C W N 1129 *Rallabandy v Yanamandra* 46 M L J 383 see *Manorama v Shiva* 42 C 480

(h) *Kashi v Gopi* 19 C 43 (see cases cited) *Shyam Lal v Rameswari* 23 C. L. J 82 cited in *Haimabali v Kunja Mohan* 35 C W N 397 see *Ramanandi v Kalawati* 7 Pat 221 26 A L. J 395

(i) *Monoma v Shiva* 19 C W N 366 369

(j) *Ramanandi v Kalawati* 55 I A 18 7 Pat 221

(k) *Kali v Ishan* 31 C. 914 9 C W N 49 *Haimabali v Kunja Mohan* 35 C W N 397

(l) *Manorama v Shiva* 19 C. W N 366.

(m) *Shyama v Profulla* 19 C. W 897 896.

explanation of the delay (a) Acquiescence is also a bar to reopening probate proceedings (b)

24 Procedure Proceedings may be initiated in the following ways —

(i) By motion on notice This method is to be adopted where it is sought to recall a grant on the ground of irregularity in making the grant (c) Proceedings should be initiated by a motion rather than by a rule the latter being confined to applications which are urgent and where injunction is asked as one of the reliefs (d)

It appears that when revocation is sought on this ground the informality or irregularity being established the probate will be recalled and then the party who obtained probate will be required to prove the will *de novo* and in solemn form (e)

(ii) By suit Proceedings should be by suit on citation where the ground on which the relief is sought is that the will is invalid *e g* where fraud or undue influence or forgery is alleged (f) or where S 44 of the Evidence Act applies (g) The person guilty of fraud need not be a party to the suit (h)

A proceeding for revocation of probate or of letters of administration is not strictly speaking a suit *e g* within the meaning of O 23 r 3 but is a miscellaneous proceeding (i) Under S 141 of the C P C and Ss 268 and 295 of this Act the procedure in regard to suits shall be followed in probate or in revocation proceedings so far as the circumstances of the case permit (j)

(iii) Appeal A grant may be reversed by appeal to a higher tribunal (k)

The only matter for consideration upon an application for revocation is whether the applicant has made out a just cause for revocation The application cannot be thrown out on the ground that the applicant has not adduced evidence sufficient to throw doubt on the genuineness of the will for the question at issue may be not the genuineness of the will but whether the proceedings to obtain the grant were defective in substance (l)

The party applying for revocation must produce and deliver the grant for cancellation unless it is impossible *e g* because the grantee has left the country (m) or the grant has been lost or mislaid (n) A revoked grant of letters

- (a) *Monorama v Shiva* 40 C 480 19 C W N 366 *Kunja v Kailash* 14 C W N 1068 1073 *Shyama v Prafulla* 19 C W N 882 30 1 C 161 *Prafullananda v Brojendra* 51 I C 593 *Kalidas v Ishan* 31 C 914 P C
- (b) *Radhashyam v Ranga* 24 C W N 541 545, see *Monorama v Shiva* 19 C W N 366
- (c) *Re Harendra* 5 C W N 383 *Daropti v Santil* 116 I C 452, (letters improperly granted)
- (d) *Re Mohendra* 5 C W N 377
- (e) *M 700 f* a cutting *Glokesht v Hurry* 30 C 528 7 C W N 450 *Kalidas v Ishan* 31 C 914 917 9 C W N 49 see *Bindaban v Surewar* 10 C L J 263
- (f) *Re Harendra* 5 C. W. N 383 *Komolochun v Nilrutton* 4 C. 360

- distd
- (g) *Daropti v Santil* 116 I C 452
- (h) *Bitch v Birch* 1902 P 130
- (i) *Pratap v Kali* 4 C W N 600 *Kalyanchand v Sitabai* 38 B 309 330 (contentious probate proceedings constitute a suit)
- (j) *Saroda v Gobindo* 12 C. L. J 291 *Dinatarini v Dolba* 8 C 880 (see procedure laid down regulating a petition under this section See *Thakur Prasad v Fakirullah* 17 A 106 22 I A 44 on app from 12 A 179 *Arunmoyl v Mohend a* 20 C 888 S 283 n & S 293
- (k) W 457 11 Ed
- (l) *Akhilleshwar v Hari* 40 C L J 297
- (m) *Baker v Russel* 1 Lee 167 *Re Langley* 2 Robert 407 W 375 398 12 Ed
- (n) *Re Carr* 1 Sw & Tr 111

of administration was allowed to remain in the hands of solicitors of the administrator who had a lien upon it (a)

A partial revocation, e g, that of a grant to one of several executors, where the grant had originally been made to all of them, does not seem to be warranted by the language of the section (b)

Where a will is impeached on the ground of forgery after a grant in common form, an opportunity should be given of proving the will in solemn form, and if the will can not be established an order for revocation will follow as a matter of course (c).

25. Effect of revocation The effect of revocation of a grant is to revive the original proceedings for grant, and it is competent for the Court to appoint an administrator *ad litem* (d) and to entertain a fresh application for a grant by the same person (e) The probate stands cancelled (f) A sale by an executor or administrator on payment to him of the consideration money is good and binding on the estate even though the appointment be afterwards revoked (g) A grant of probate or letters of administration does not on revocation become void *ab initio* Proceedings in a suit prosecuted on behalf of the estate by an executor do not become void on revocation and are binding on the estate (h) The revocation of a grant at the instance of a party enures for the benefit of all (i) As to the practice when a new grant is made to the committee of a lunatic executor or administrator, see *Re Cooke* (j)

CHAPTER IV.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION

264. (S 235 P. 51.) (1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

Jurisdiction of District Judge in granting and revoking probates, etc

- (a) *Barnes v Durham*, 1 P & D 728
- (b) Such a revocation was however allowed in *Ishan v Harkness*, 84 P W. R 1915
- (c) *Saroja v Athoy* 41 C. 19 824
- (d) *Brindaban v Sureswar*, 10 C. L. J 263, 275, see *Kamollochan v Nilrattan*, 4 C 360.
- (e) *Brhmal v S S. for Ind a* 20 A. 109
- (f) *Malshadayini v Karmadhar* 19 C. W. N 1108, *Akhieswar v Harl*,

- 40 C. L. J 297
- (g) *Henson v Sherry*, 1913 W. N 245, *Allen v Dandas*, 3 T R. 125 See the elaborate discussion of the law in *Saroja v Sada*, 19 C. W. N 240 See also a. 297
- (h) *Ma Thein v Nepean*, 8 Rang 453, 128 I C. 359
- (i) *Young v Holway* 1895 P 87
- (j) 1895 P 62.

(2) Persons so appointed shall be called "District Delegates."

Change. The words 'shall not be without' have been substituted for the words 'be made with.'

District Delegate. The term has been used in an English Statute (a) District Delegates are judicial officers appointed by the High Court, with the previous sanction of the local Government where the High Court is not established by Royal Charter, and to them the District Judge can delegate his functions in the matter of grants of probate and letters of administration in non contentious cases. Such delegation is therefore not *ultra vires* (b). There can be no District Delegate except by an appointment by the High Court. An additional District Judge, cannot exercise the powers as a District Delegate unless appointed as such by the High Court (c), but cases may be transferred to him under Act XII of 1887 (d). Under that Act the High Court may authorise the District Judge to transfer an application for probate to a subordinate Judge (e).

266. (S. 236. P. 53.) The District Judge shall have

District Judge's powers as to grant of probate and administration

the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.

The section The section declares that the powers conferred on the District Judge in testamentary proceedings are to be regulated by the Civil Procedure Code (f). Some of those powers are detailed in S. 283 and the procedure is laid down in Ss. 268 and 295. The Probate Court may, if necessary, construe a will in order to determine whether a person is entitled to a grant (g), similarly a Probate Court may go into the question of adoption so far as it has any bearing on the genuineness of a will (h). A District Judge in Bengal and N. W. Provinces can transfer a case to the Subordinate Judge under Act XII of 1887 (i). A Court has no power to award costs in a proceeding under S. 19-H of the Court Fees Act for ascertaining the valuation of properties (j). A proceeding under the Probate and Administration Act is a "Suit" within the meaning of S. 2 of the Santal Pargannas Act, 1855, and an appeal lies to the High Court from an order of the District Judge of the Santal Pargannas rejecting an application for probate, the value of the subject matter in dispute exceeding Rs. 1000 (k). Where competing applications

(a) 25 Hen VIII. c. 19. W. cited in M. 720

(b) *Kunja v Kailash*, 14 C. W. N. 1069, 1070.

(c) *Ram Singh v Murli Bai*, 68 I C. 940

(d) *Daho v Tural*, 3 Pat 609, 78 I C. 701

(e) *Kunja v Hem*, 25 C 340

(f) *Ghanshamdoss v Saraswathi* 87 I

C 621, 629

(g) *Arunmoyl v Mohendra*, 20 C 883

(h) *Dulhin v Harnandan*, 20 C. W. N. 617, 33 I C 790 P. C.; see *Mahasunder v Ram Ratan*, 35 I C. 416

(i) *Kunja v. Hem* 25 C 340

(j) *Hriday v. S of S for India* 50 C 239, 72 I C. 472

(k) *Sufal v. Salla*, 9 Pat 507

for probate of different alleged wills have been heard by the District Court as a regular suit, an appeal from the final order passed thereon by the High Court lies to the Privy Council, subject to the provisions of Ss 109 and 110 C. P. C. (a)

The section was based on the Court of Probate Act, 1857 (20 & 21 Vict c 77, S 25), now repealed, which ran as follows —

“The Court of Probate shall have the like powers, jurisdiction and authority for enforcing the attendance of persons required by it as aforesaid and for punishing persons failing, neglecting or refusing to produce deeds, evidences or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be enquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court”.

267. (S. 237. P. 54.) (1) The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person

(2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same.

(3) Such person shall be bound to answer truly such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default.

(4) The costs of the proceeding shall be in the discretion of the Judge.

1. Change The word ‘truly’ has been introduced in sub-sec (3) to remove any doubt as to what is clearly the intention of the provision Joint Committee Report

2. The section. The section empowers the Probate Court to call upon a person to produce and bring into Court a document of a testamentary nature or to attend for the purpose of being examined, even when no probate proceeding is pending in that Court, and in this respect the power differs from that enjoyed by a Civil Court under O XVI For analogous provision see S. 136, Indian Companies Act

See generally, Woodroffe, Evidence Act Ch X, notes As to the production of registered wills, see Indian Registration Act (XVI of 1908, S 46)

The section is based on the Court of Probate Act 1857 (20 & 21 Vict c 77 S 26) as amended by S 25 of the Act of 1858

3 Sub-section. (1). In an application for the executor to prove the testator's will the court directed him to lodge the said will in Court (a) An exemplification of a will comes under this section and may be ordered to be brought into Court (b) The English Statute authorises the issue of subpoena requiring any person to produce in Court any testamentary paper If a party has not got the paper he is called upon to produce he should file an affidavit to that effect (c) Production may be ordered by motion in Court (d) An attorney cannot refuse to produce the original will and seek to retain it by virtue of his lien (e) Where the executors and solicitors of the deceased refused to give any information as to previous wills alleged to have been executed by the testatrix the Court ordered them to bring all testamentary papers to Court (f)

4 Sub-sec (2) Where there are reasonable grounds for believing that a person has knowledge of any testamentary paper he may be directed to attend Court to be examined (g) Such attendance may be required for other purposes in connection with testamentary matters, e g. to prove the execution of a will (h) A witness summoned to attend Court is entitled to his conduct money (i) and to be represented by Counsel (j) If he be too ill to attend Court he may be examined on commission (k)

5 Subsec. (3) In England obedience to the subpoena may be enforced by a motion for attachment (l), but the Court should in such a case first of all order the attendance of the person in Court (m). The executor may be ordered to take probate at once (n)

- (a) *Dayabhai v Damodardas* 21 B 75
 (b) *Re Newton*, 8 B L R appdx 76
 (c) *Rawlings v Emmerson* 57 L J P. 1
 (d) *Tr & C* 387
 (e) *Georges v Georges*, 18 Ves. 294
 (f) *Re Shepherd* 1871 P 323
 (g) *Re Laws* 2 P & D 458.
Banfield v Pickard 6 P D 33.
Parkinson v Thornton 37 L J P 3 W 198.
 (h) *Re Sweet* 1891 P 400 Tr &

- C 387
 (i) *Re Haney* 1907 P 239
 (j) *Re Cope*, 36 L J P 53 W 197 In.
 (k) *Banfield v Pickard*, 6 P D 33
 (l) *Simmons v Dean* 27 L J P 103
 (m) *Parkinson v Thornton* 37 L J P 3 W 193 In.
 (n) *Marjant v Clarke* 1 P & D 592

268. (S. 238. P. 55.) The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

1. The section. It has been already provided by S. 266 that with regard to probate proceedings the District Judge shall have "the like powers and authority" as are vested in him in relation to any civil suit or proceeding pending in his Court. This section lays down the procedure to be adopted in connection with these proceedings. See also S 295.

Though this Act is not confined to substantive law but deals with adjective law as well, still the procedure laid down in it (see Ss. 267, 270, 271, 280, 281, 283) is not comprehensive, accordingly this section provides that in the absence of any special provision contained in this Act, the proceedings will be regulated by the Civil Procedure Code, so far as the circumstances of the case permit. The provisions of that Code, therefore, have not been repeated in this Act (a). The application of the provisions of the Civil Procedure Code to probate proceedings it should be noted, is qualified by two provisos viz, 'save as hereinafter otherwise provided' and 'so far as the circumstances of the case admit'. The words used in S 295 are 'as nearly as may be'. An applicant for probate cannot be regarded as a plaintiff in a suit in respect of a cause of action (b).

2. Granting of probate The expression includes revocation proceedings (c) In contentious cases with regard to the filing and the form of caveats the provisions of the Civil Procedure Code will apply (d)

3. Contentious and non-contentious cases. Proceedings before the District Judge in connection with probate or letters of administration may be contentious or non-contentious. The Code of Civil Procedure is expressly made applicable to the former (S. 295) The petition for probate is to be treated as the plaint in a suit, and the suit governed by the provisions of the C. P. Code as far as possible (e).

4. Non-contentious matters. These are disposed of by the registrar of the High Courts of the various Presidencies (f). They are not suits but miscellaneous proceedings, one consequence of which is that probate can be granted only on evidence taken in Court and not on affidavits as provided in O r. 1, C P C (g). But under S. 141 C. P. C that Code is to be followed in

(a) *Yeshwant v Shankar*, 17 B 388, 391.

(b) *Ganeshdoss v Saraswathi Bai*, 87 I C 621.

(c) *Rebells v Rebells* 2 C W N 100.

(d) *U Shree v. Maung*, 82 I C. 973

(e) *Re Dintarini* 8 C. 880; *Paklam v Innast*, 19 M. 458; *Chotalal v Bai Kababai*, 22 B 261.

(f) *Chotalal v. Bai Kababai*, 22 B. 261.

(g) *Ram Gopal v Radha*, 10 C. W. N xcv; *Re Dawubai*, 18 B. 237 fold

connection with these proceedings The Code must, therefore, so far as it can be made applicable, govern non contentious cases also Thus in respect of an application for revocation of probate on the ground among others of non service of citation the procedure for setting aside an *ex parte* decree should be followed (a), where special procedure has been laid down in this Code English rules do not apply (b)

5 Application of C P Code Cl 15 of the Letters Patent An order refusing to stay the issue of probate and the discharge of the receiver is a judgment within the meaning of this clause (c)

S 52(2) applicable against administrator who does not render account (d)

S 60 The life interest of a Hindu widow can be attached and sold (e)

S 104 (and O 43 r 1) An appeal lies to the High Court from an order of the District Judge admitting a person as a caveator (f) or refusing to grant letters of administration with a copy of the will annexed (g) but no appeal lies refusing to make the appellant a party under O 1 r 8 11 (h)

S 115 The High Court can interfere in revision (i)

O 1 r 8 13 A representative suit by a legatee must be with leave of Court or if a legatee sue an executor, the executor may apply that the other legatees should be made parties (j)

O 5 r 17 Procedure when defendant refuses to accept service or cannot be found (k)

O 6 r 15 Rules regarding verification of pleadings (l)

O 9 r 13 Setting aside *ex parte* decrees (m)

O 11 An affidavit of assets actually received can be obtained in probate proceedings by interrogatories only (n)

O 16 r 20 On a caveator refusing to answer a question put to him the Court made an order for grant of probate to another (o)

O 21 (and s 47) A decree directing the issue of a grant of probate is capable of execution (p)

O 31 Proceedings by or against executors and administrators (q)

(a) *Dintarni v Dolbo* 8 C 880,
Re *Amrita* 27 C 350

(b) *Re Nesbitt* 4 B L R appdx
49

(c) *Brij Coomaree v Ramrick* 5 C
W N 781

(d) *Ko Maung v Daw Top* 6 Rang
474 112 1 C 427

(e) *Annaji v Chandrabai* 17 B 503

(f) *Abhiram v Gopal* 17 C. 48

(g) *Mountstephens v Orme* 22 1 C
93

(h) *Ahettiamoni v Shyama* 21 C
539

(i) *Geindra v Rajeswar* 27 C. 5
Ahettiamoni v Shyama 21 C. 539

(j) *Abhiram v Gopal* 17 C 48

Hafiza Bai v Kazi Abdul 19 B
83 *Purshottam v Kala Govindji*
26 B 301 *Geereebala v Chunder*
11 C 213

(k) *Re Dintarni* 8 C 880

(l) *U Shwe v Maung* 82 1 C
973

(m) *Re Dintarni* 8 C 880

(n) *Anlabala v Rajendra* 43 C 300,
34 1 C 227

(o) *Raoji v Vishnu* 9 B 241

(p) *Brij Coomaree v Ramrick* 5 C
W N 781

(q) *Hafza Bai v Kazi Abdul* 19 B
83 *Geereebala v Chunder*, 11 C.
213

O 32 In connection with proceedings by or against minors and persons of unsound mind special citation is to issue (a)

O 33 Applications for grant or revocation of probate may be made in *forma pauperis* (b)

O 39 The Probate Court is not incompetent to grant injunction in any circumstances but the proper procedure is to appoint an administrator *pendente lite* first and then to apply for injunction (c) The Probate court has the same power in ordering an inventory to be made as the Civil Court under O 39 r 7 (d)

O 40 A receiver may be appointed in a testamentary suit (e)

O 41 r 5 A decree directing the issue of a grant of probate to the propounder is one that is capable of execution The propounder on paying the stamp fees and obtaining the grant is clothed with the character of the executor and may be said to have carried out or executed the order A stay of execution of such a decree can be granted under O 41 r 5 (f)

6 Where C. P. C. does not apply S 145 is not applicable against sureties under an administration bond (g) O 9 r 9 An applicant for probate is not debarred from making a fresh application if dismissal of the former application be not on merits (h) O 20 r 20 which authorises Court to pronounce judgment against a party refusing to give evidence or produce a document without lawful excuse when required by Court does not apply in probate proceedings (i) O 23 allowing withdrawal from or compromise of suits does not apply to probate proceedings An applicant for probate is not competent by means of a compromise to obtain a reversal of the decision during the pendency of appeal (j) A probate cannot be granted by consent of parties but the will must be proved (k) A compromise of revocation proceedings however may not be unlawful where the will was proved in common form (l) A compromise in

(a) *Re Amritlal*, 27 C 350 *Nabagopal v Srigopal*, 23 C. L. J 79, *Akhileswari v Harl*, 40 C. L. J 297

(b) *Re Dawubal*, 18 B 237, *Re Guru Charan*, 6 C W N cxlvii, *Chintaman v Ramchandra*, 12 Bom L. R. 694

(c) *Nirodebarini v Chamalkarini*, 19 C. W N 205, 27 I C 617, *Nicholas v Dracachis*, 1 P D 72, *Re Moore* 3 P D 36 *reld to English cases are not of much assistance*

(d) *Ginbala v Prokash* 49 C. L. J 484, 120 I C. 469

(e) *Nirodebarini v Chamalkarini*, 19 C W N 205, 27 I C. 617 *foling Yeshwant v Shankar*, 17 B 388, *Re Dawubal*, 18 B 237, *Watkins v Brent* 5 L. J Ch 49, *Hafizabal v Abdul* 19 B 83

(f) *Brj Coomaree v Ramrick*, 5 C W N 781

(g) *Ko Maung v. Daw Top*, 6 Rang

474 112 I C. 427

(h) *Ramani v Kumud*, 14 C. W N 924, commented in *Kalyanchand v Sitabal* 16 Bom L R 5, 23 I C 325 F B *Ganshamdoss v Saraswa'hi*, 87 I C 621 *per contra Rallabandi v Rallabandi*, 52 I C. 639

(i) *Raoji v Vishnu* 9 B 241

(j) *Saroda v Gobindo*, 12 C L. J 91

(k) *Monmohini v Banga* 31 C. 357, *Jageshwar v Jagatdhari* 40 I C 345 2 Pat. L. J 535, *Janakball v Gajanand*, 1 Pat L. J 377, *Bishunath v Sarju Rai* 29 A L. J 835 (Terms of a private compromise of a contentious probate proceeding admitting the genuineness of the will cannot be embodied in the probate or in the order of Court)

(l) *Hargreaves v Wood* 2 Sw & Tr 602, *Wythesley v Andrews*, 2 P & D 327

revocation proceedings amounting to a *bona fide* settlement of disputes will bind the reversioners. The compromise must be for the benefit of the estate and not for the personal advantage of any person interested (a). The only effect of compromise in respect of an application for grant is to reduce a contentious proceeding into a non-contentious one so that probate can be granted in common form only (b). O. 32 r. 4 applies when the proceedings have arrived at the contentious stage (c). O. 39 r. 1. A probate proceeding is not a suit in which there is any property in dispute under this rule (d).

7. Res judicata. A suit by executors as persons beneficially entitled under the will to property left by the testator is not barred by *res judicata* by an order refusing probate (e), nor does such refusal bar an application by any other person claiming an interest under the will. An executor who presents an application for probate of a will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action (f). Where probate is refused not on the merits but for defect of procedure, the application may be made again. O. 9 r. 9 is no bar to such an application (g). So also dismissal for non prosecution or absence of the plaintiff will not operate as *res judicata* (h).

The judgment of a Probate Court granting or refusing probate is a judgment *in rem* and therefore the judgment of any court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the *factum* of the will propounded in that Court.

Where on an application under the Guardians and Wards Act (VIII of 1890) a will was found to be a forgery, *held*, this finding was not *res judicata* for the purpose of proceedings under the Probate and Administration Act (s). A decision by the Probate Court that the will was not revoked by the testator and that he did not give his widow authority to adopt and that certain words formed part of the will is *conclusive* and bars a subsequent suit to try those issues (j). A declaration by a Probate Court, confirmed on appeal that a certain person is not the next reversioner of the deceased bars a suit by that person for such declaration, but not where the object of the latter is not to get a declaration merely but to protect his interest (k), the contrary view has also been

- (a) *Mohendra v Shamsunnessa*, 21 C. L. J. 157, 163; *fold in Sityam Lal v Rameswari*, 23 C. L. J. 82, *Surja Prosad v Shyama*, 14 C. W. N. 967, *Kunja Lal v Kailash*, 14 C. W. N. 1068, 1071 (see English cases cited).
 (b) *Janakball v Gajanan*, 1 Pat. L. J. 377.
 (c) *Saifindra v Hironmoyee*, 24 C. W. N. 538, *Radhashyam v Ranga*, 24 C. W. N. 541 (all the rules in O. 32 are not strictly applicable).
 (d) *Nirod v Chomatkari*, 19 C. W. N. 205.
 (e) *Ganesh v Ram*, 21 B. 563, see

- Mirza Kumtulain v Abbas Hossain*, 32 I. A. 244, 33 C. 116.
 (f) *Ganshamdoss v Sarasathi*, 87 I. C. 621, 629.
 (g) *Ramani v Kumud*, 12 C. L. J. 185, 7 I. C. 126, *Brojolah v Sharajubala*, 84 I. C. 154.
 (h) *Chand v Parlab*, 15 I. A. 156, 16 C. 98.
 (i) *Chinnasami v Hariharabhadra*, 16 M. 380.
 (j) *Brendon v Sunderabai*, 23 I. C. 221.
 (k) *Ramnandan v Sheoparsan*, 11 C. L. J. 623, see *Kidar v Mathu*, 47 C. 555.

held (a) The decision in a Probate Court that A was the son of B was *res judicata* in a subsequent suit in a Civil Court (b)

269 (S. 239). (1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage, and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate

1 Change Sub section (2) has been added to the section in this Act. Sub sec (2) incorporates the provision of Act VII of 1901 and as the provision is not incorporated in the Act of 1881 it excludes the persons to whom that Act relates from the purview of the clause. Notes on Clauses

2 The section The provisions of this section may be compared to those of S 195. The section is distinguished from S 247 in this way. The latter section contemplates an application by a party to the proceeding after the commencement thereof and gives the person appointed the power to deal with the estate subject to the restrictions mentioned in the section whereas this section contemplates an application even by a stranger and made before the commencement of any proceeding and the appointment will be made if necessary for the protection of property and the person appointed will have no other right than that of custody over the property. Under S 247 the Court appoints administrators *pendente lite* under this section receivers have been appointed in testamentary proceedings (c). In as much as the person appointed has no power to deal with the property a prayer for administration along with protection is irregular (d).

Formerly receivers were appointed by the Court of Chancery during the pendency of probate proceedings (e). Since the Judicature Act the application is made

- (a) *Chintaman v Ramchandra* 12 Bom L R. 694. *Lal v Radharaman* 15 C. W. N 1021 (where the plea of *res judicata* was overruled on the ground that the Probate Court was not competent to go into questions of title)
- (b) *Dwijapada v Kalipada* 46 C. L J 596 (see cases *referred to*)

- (c) *Yashwant v Shankar* 17 B 388, *Re Dawabul* 18 B 237 see *Nind v Chamatkarini* 19 C. W N 205 27 1 C. 617
- (d) *Overington v Ward* 34 Beav 175
- (e) *King v King* 6 Ves. 172 see *Baron v Rock* 22 Beav. *Titchborne v Titchborne* 730

in the probate division of the High Court (a) unless good grounds are made out for the interference of the Court of Chancery, *e. g.*, danger to assets (b) The Court's power to act under this section comes to an end after the letters have been granted (c)

3 Sub-section (1) Under this sub-section the District Court has power to make an order with reference to the property of a deceased person under certain circumstances so long as no person has been appointed administrator of the estate or granted probate of the will But this section has no application after an administrator is constituted, though the High Court may make the order under S 302 (d) For similar provision, see Administrator General's Act (III of 1913, S 54)

4 Sub-section (2). See change above Although the operation of sub sec (1) is excluded in case of Hindus, &c, yet the Court can appoint a Receiver in a suitable case under the Civil Procedure Code (e)

270 (S. 240. P. 56) Probate of the will or letters of

When probate or administration may be granted by District Judge

administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge

1. The section The section is based on the Court of Probate Act, 20 & 21 Vict c 77, s 46 S 264, confers jurisdiction on the District Judge in testamentary matters This section defines the jurisdiction thus conferred and lays down two tests for the purpose. The jurisdiction of a Court is not taken away because the properties dealt with in the Probate are within the jurisdiction of another Court by reason of the bifurcation of the district (f)

(1) Did the deceased have a fixed place of abode within the jurisdiction of the District Judge? (u) Did he leave movable or immovable property within the jurisdiction of the District Judge? These tests are quite general and are similar to those applied for determining jurisdiction in ordinary civil suits They are quite independent of the place where the will was executed or of the nationality of the testator or of the place of his domicile (g) The test of jurisdiction in a case of revocation of grant is the same as in that of making a grant (h)

- (a) *Re Ivory*, 10 Ch D 372, see *Hilchen v Birks* 10 Eq 471 (prior to Judicature Act) W 356 12 Ed
- (b) *Re Pryce*, 1904 P 301, *Re Oakes* (1917) 1 Ch 230 (appointment not made because there was no danger)
- (c) *Winsor v Winsor* 44 B 692
- (d) *Winsor v Winsor* 22 Bom L R 396 57 I C 116
- (e) *Yeshwant v Shankar*, 17 B. 388,

- Hafizabal v Kazi Abdul*, 19 B 83
- (f) *Subramaniam v Ramaswami* 31 I C. 499
- (g) *Bhaurao v Lakshmi Bai* 20 B 607 See *Lal Singh v Kichen* Decl, 110 I C 391
- (h) *Re Harrolall* 8 C 570 573. *Fardunji v Nacajbal*, 17 B 687

2 Fixed place of abode The word dwelling is synonymous with the term 'place of abode' or 'residence'. It is the place where a man lives and what he considers his home. The residence must be of a more or less permanent character, of such a nature as to show that the Court in which he is sued is his natural forum (a). The word 'fixed' does not mean permanent (b). A person may have more than one place of abode (c). Where a man has no permanent residence he may be said to dwell wherever he may be found (d), or the Judge of the District in which his debts are has authority to grant a certificate under Act XVII of 1860 (e). "The words 'residence' and 'business' have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and the intent of the Act in which they occurred" (f).

3. Property. The District Judge has jurisdiction to grant probate if there be property movable or immovable within his jurisdiction, though the will be executed out of British India by a person who is not a British subject (g), or a part of the estate of the deceased be outside the jurisdiction of the Court or outside the province (h). It is sufficient for the purpose of giving jurisdiction that property should be actually in the possession of the deceased and claimed or dealt with by him as his own irrespective of the fact whether title by which the property was held was good or bad (i). Where residence in Calcutta was for medical treatment and the property of the deceased in Calcutta consisted of a watch and chain an umbrella and wearing apparel held, the High Court had jurisdiction to entertain an application for revocation of probate (j). In respect of a will executed in Bombay the District Judge of the place where the immovable property devised by the will was situate has jurisdiction to grant probate (k).

4 Jurisdiction of the High Court In the absence of any provision defining its testamentary jurisdiction the High Court of Madras held itself to be governed by this section although the words of the section are not applicable to the High Court (l). On the contrary the High Court of Calcutta has held that it has power to grant probate or letters of administration if the petition could have been presented before any District Judge in any of the two provinces of Bengal (m).

- (a) *Gopal v Kumodhar* 7 W R 349, *Shri Goswami v Govardhan Lalji* 14 B 541, on app 18 B 290 294, *Fatima Begam v Sakina Begam* 1 A 51 *Ugar chand v Surajmal* 2 Bom L R 605 *Guranditta v Ramdas* 38 I C 62, but see *Srinivasa v Venkatarada*, 29 M 239, 274 on app 38 I A 129, 139, 11 I C 447
- (b) *Gowind v Anant*, 71 I C 816 (existence of movables within jurisdiction sufficient) see *Sobhag Rani v Lado Rani* 116 I C 305
- (c) *Orde v Skinner*, 7 I A 196 3 A 91
- (d) *Fernandez v Wray*, 25 B 176

- 3 Bom L R 291
- (e) *Golam v Mahomed* 20 W R 286 *Mayhew v Tullock*, 4 N W P H. C R 25
- (f) *Re Bowie*, 16 Ch D 484, 487
- (g) *Bhaurao v Lakshmi Bai* 20 B 607 (see English cases referred to)
- (h) *Lal Singh v Kishen Dasi*, 110 I C 391
- (i) *Run Bahadur v Rajrup*, 4 C. L. R 498
- (j) *Re Mohendra* 5 C W N 377, but see *Bai Manchha v Bai Ganga* 1 Bom L R 666.
- (k) *Raoji v Vishnu*, 9 B 241
- (l) *Re Rose* 24 M 120
- (m) *Nagendrabala v Kashipati*, 224

271. (S. 241. P. 57) When the application is made

Disposal of application made to Judge of district in which deceased had no fixed abode.

to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction.

Change. The words "it shall be in the discretion of the Judge" have been substituted for the words "the Judge may in his discretion."

Discretion of Court. This section gives a Judge of a district where the deceased has left property a discretion to refer an application to a more convenient Court, when between courts of different districts in British India there is a question as to which of such Courts can most justly or conveniently grant probate, but when there is no Court of concurrent jurisdiction in British India to which the applicant can apply for probate the Judge is vested with no such discretion. Thus, if a testator, who is not a British subject, makes a will in Baroda but leaves property in British India, the executor is entitled to probate of the will in the Court in British India which has jurisdiction in the case, and when there is more than one such Court in the most convenient of them Baroda is not a district within the meaning of the Act and the Court in British India has no discretion to refer the applicant to the Baroda Court (a).

When property within the jurisdiction of a Court is of trifling value the Court, in its discretion, may refuse the application if it can be more conveniently disposed of in the Court of another district (b).

The Court can exercise its discretion under this section where the deceased had no fixed abode at the time of his death within the jurisdiction of the Court but only left property within such jurisdiction. The discretion has to be judicially exercised. The mere fact that the deceased lived in Calcutta, or that all the witnesses did so, or that the major portion of the testator's property was situate in Calcutta, does not entitle a Court to refuse to entertain an application for probate under this section. The applicant is *dominus litis* and his choice should be given effect to unless there are sufficient grounds made out to show why the proceedings should not be held elsewhere (c).

272. (S. 241 A. P. 58). Probate and letters of admini-

Probate and letters of administration may be granted by Delegate

stration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as

(a) *Bhaurao v. Lakshmital* 20 B 607.
(b) *Bai Manchha v. Bai Ganga*, 1 Bom L. R. 66, but see *Re Mohendra* 5 C. W. N. 377.

(c) *Ananga v. Balal*, 33 C. L. J 386, 63 I C. 523. (Expenses of litigation were an item to be taken into consideration)

hereinafter provided, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

The section. Probate or letters of administration may be granted by a District Delegate, it will be seen, only in cases where there is no contention, provided the deceased had a fixed place of abode within the jurisdiction of the District Delegate. A District Judge can make a grant if the deceased had any property, movable or immovable, within the jurisdiction of the Judge (S 271), but a District Delegate cannot make a grant under similar circumstances. As to the meaning of the expression, 'fixed place of abode,' see S 270, note.

273. (S. 242. P. 59). Probate or letters of administration shall have effect over all the property and estate, moveable or immovable, of the deceased, throughout the province in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted :

Provided that probates and letters of administration granted—

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the province does not exceed ten thousand rupees,

shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

1. Change. The words 'the property and estate' occurred in the Succession Act whereas in the Probate and Administration Act occurred the words 'the property' only

2. The section. S 227 says that probate establishes a will from the death of the testator. This section lays down the extent of the territory over which it shall have effect and also the extent to which such a grant is conclusive. The section coupled with S. 213 makes probate the title of the executor to the property and also makes it evidence of the contents of the will itself as against

be impeached in a civil court would be those stated in S 44 of the Evidence Act, *viz.*, that the probate was granted by a Court not competent to grant it or that it was obtained by fraud or collusion, which means fraud and collusion upon the Court and perhaps also upon the person disinherited (a), but it could not be shown that the will was never executed by the testator or was procured by a fraud practised upon him (b) A person having an interest *eg*, a creditor or mortgagee, though he cannot impeach a will of which a probate has been granted so long as probate remains, may apply for revocation under S 263 (c)

The Court is bound to assume that all documents admitted to probate are of a testamentary character (d) After probate it is not permissible to prove that another person was appointed executor, or that the testator was insane, or that the will probated was forged (e) In an administration suit a determination by the Probate Court as to who are the next of kin of an intestate is conclusive between the parties (f) Letters of administration are conclusive of the intestacy of the deceased (g)

6 Probate when not conclusive The section does not say that the grant is conclusive upon all persons or upon all questions but is much more limited in its scope A grant of probate is not conclusive on a question of construction of the will or of the determination of the rights of persons under the will (h), nor of the fact that the property disposed of by the testator really belonged to him and, therefore, it does not prejudice in any way the rights of persons entitled to the property (i) nor on any question of inheritance or of the right to be appointed as *shebait* (j), nor on any collateral matter *eg*, as regards the domicile of the deceased (k)

Probate does not prevent a Civil Court from declaring what effect is to be given to a will after probate Civil Court may declare one or two provisions of a will of a Muhammadan testator to be inoperative as being opposed to Muhammadan law (l) Conclusiveness of probate is no bar to the institution of revocation proceedings under S 263 (m)

7 Payment to executor or administrator Payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the deceased notwithstanding the grant be afterwards revoked and declared

- (a) *Barnesley v Powell* 1 Ves Sen 119, 284
 (b) *Allen v M Pherson* 1 H L C 27, see *Kornolochun v Nilrutton* 4 C 360, *Griffiths v Hamilton* 12 Ves 293 307, *Re Bhabosoondurt* 6 C 460 *Kishorbal v Kanchodia* 38 B 427
 (c) *Nobin v Bhabosoondurt*, 6 C. 460
 (d) *Re Bannace*, (1910) 2 Ch 419, *Re Wernher* (1918) 1 Ch 339 (1918) 2 Ch 82.
 (e) *Re Ivory* 10 Ch D 372
 (f) *Barrs v Jackson* 1 P 582, *Spencer v William* 2 P & D 230

- (g) *Tourlon v Flower* 3 P W. 369
 (h) *Rajendra v Manick*, 8 A L J 1063 111 C. 235
 (i) *Behary v Juggo* 4 C 1 *Kurrutulain v Abbas* 33 C. 116 P C
 (j) *Jagannath v Runjit*, 25 C. 354 369
 (k) *Whicker v Hume*, 7 H L C 124, *Concha v Concha*, 11 A C 541, *Bradford v Young* 26 Ch D 656 29 Ch D 617
 (l) *Mohamed v Sabida*, 23 C W N 658 *Kurrutulain v Abbas* 33 C 116 P C
 (m) See *Nobin v Bhabosoondurt* 6 C 460, *Jagannath v Runjit*, 25 C 354

void (a) An executor cannot ask to be relieved of the payment of a legacy because it is interlined in the will after grant of probate (b), but the case is different where a man fraudulently inserts his name in place of a legatee (c) A claim by an administrator for recovery of rent was not allowed to be resisted on the ground of misrepresentation of the fact of adoption (this not being covered S. 44 of the Evidence Act) (d).

8 Proviso. This proviso was added by Act XIII of 1875 S 2, which ran as follows — Provided that probate and letters of administration granted by a High Court after the first date of April 1875, shall, unless otherwise directed by the grant, have like effect throughout of the whole of British India'. Before this amendment a grant by the High Court did not extend beyond the limits of the province within which that Court exercised its jurisdiction (e) The above amendment was replaced by the present proviso by Act VIII of 1903 s 3 (1) The proviso does not apply to a grant to the Administrator General See also S 24 of the Administrator General's Act (III of 1913) and see *re Hewson* (f)

274 (S. 242 A. P. 60.) (1) Where probate or letters of administration has or have been granted by a High Court or District Judge with the effect referred to in the proviso to section 273, the High Court or District Judge shall send a certificate thereof to the following Courts, namely. —

(a) When the grant has been made by a High Court, to each of the other High Courts,

(b) When the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts

(2) Every certificate referred to in sub-section (1) shall be made as nearly as circumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the High Court receiving the same

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 276 and 278, to be situate within the jurisdiction of a District Judge in another province, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same

(a) *Allen v Dundas*, 3 T R 125
 (b) *Plume v Beale*, 1 P W 388
 (c) See W 442
 (d) *Ambica v Kala*, 10 C W N 422.

(e) *Re Nechteslain*, 1 B L R O C 19.
Re Duncan 1 B L R O C J 3.
Re Rajraanee 1 C 52, 24 W. R. 206
 (f) 4 C. 770.

Change The words have been granted by a High Court or District Judge in sub sec (1) have been taken from S 242 A of the Succession Act. In the Probate and Administration Act occurred the words have been granted by a Court. The words shall be made in Schedule IV in sub sec (2) have been substituted for the words shall be to the following effect namely — (here was set out the form of the certificate)

The section The section was added to the Succession Act as S 242A by Act XIII of 1875 s 3. That section was repealed and substituted in its present form by Act VIII of 1903. Compare Administrator General's Act III of 1913 S 24. See the rules of the Calcutta High Court Ch XXXV r 14 and of the Bombay High Court r 587.

275 (S 243. P. 61.) The application for probate or letters of administration, if made and verified in the manner hereinafter provided, shall be conclusive for the purpose of authorising the grant of probate or administration, and no such grant shall be impeached by reason only that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

Change The word provided has been substituted for the word mentioned.

The section This section as also Ss 276 and 278 have been enacted for the purpose of authorising the grant of administration and rendering it conclusive even though there might be incorrect statements or omissions in the application upon which the grant is issued. The sections have no reference to the valuation of the estate for the purpose of levying a Court fee upon it. They are enacted for jurisdictional and not for fiscal purposes (a).

Unless by a proceeding The concluding words of the section state that want of jurisdiction will be no ground for impeaching a grant. Therefore no revocation proceeding will lie on this ground unless it is covered by the words of S 263. In one case however where after the grant of letters of administration by a District Judge it was discovered that the deceased had left no property within the jurisdiction of the Court on an application for a grant being made to the High Court the High Court made the grant but only after the previous grant had been revoked (b).

276 (S 244. P. 62) (1) Application for probate or letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in section

237, 238, and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

(a) the time of the testator's death,

(b) that the writing annexed is his last will and testament,

(c) that it was duly executed,

(d) the amount of assets which are likely to come to the petitioner's hands, and

(e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state,—

(a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate.

1. The section. The section contemplates a case where a will is in existence and the application is for a grant of probate or of letters of administration with the will annexed. It sets out the contents of a petition for such a grant and states the particulars that it must contain. The section, though it obviously has in view a written will, does not exclude from its operation a nuncupative will whether of a privileged person or of a person not governed by S. 57 (a). For further requirements see Ss. 273, 277, 279, 280, 281, 283.

(a) *Re Haji Mahomed*, 24 B. 8; see *Balak Ram v. Nanun Mal*, 11 Lah. 503, 525; *Pitam Lal v. Kalla Ram*, 29 A. L. J. 711 F. B. (it makes no difference in the eye of law that the will was taken

down in writing. But the onus of establishing an oral will is always a very heavy one.) *Beer Pertab v. Rajindar*, 12 M. I. A. (28) 104d in *Venkat Rao v. Namdeo*, 29 A. L. J. 1131 P. C.

2 Sub-sec (1). A copy, draft, or statement, Under S 228 when a will has been proved and deposited in a Court of competent jurisdiction beyond the limits of a province or in a foreign country a properly authenticated copy of the will must be produced before letters of administration can be granted (a)

3 Cl (c) Strict proof of the execution of the will must be given (b). In a probate proceeding the Court has no concern with the devolution of property. The only issue before it is whether the will has been proved to be genuine and duly executed (c). The court has no authority to refer the factum of the will to arbitration (d), but must be satisfied on the evidence placed before it that the will was the will of the testator (e).

Clause (d) These words were introduced by Act VI of 1889 s 3. An affidavit of assets is also required by the Court Fees Act S 19. The object of the amendment requiring the applicant to state in his application the amount of assets likely to come to his hands was to furnish a basis for testing the accuracy of the subsequent inventory and accounts (f). The petition ought to state all the assets which are likely to come to the petitioner's hands, not merely such part of them as he chooses to name. The petitioner is to give security if letters of administration be granted (g). Power of appointment to a fund is property and should be stated in the affidavit of valuation (h). The Administrator General is not required to file an affidavit of valuation (i). But it is necessary in other cases (j). The word 'assets' means property of a deceased person chargeable with and applicable to the payment of his debts and legacies. It therefore includes immovable property (k).

4. Clause (e). The use of the word 'named' is not a happy one, for an executor may not be named in all cases but his appointment may be made by necessary implication [S 222 (2)]

5. Sub-sec. (3). This statement is required because the District Judge will have no jurisdiction to make a grant if the assets outside the province exceed Rs 10,000 (S 273)

6 Other particulars Besides the above particulars under the rules of the Calcutta High Court it is necessary that an application for probate should be accompanied by (i) a certificate of the Registrar as to duty having been paid or a certificate of the Taxing Officer that no duty is payable, (ii) a certificate that no intimation has been received by this Court from any other High Court or District Court of any grant of probate or letters of administration (iii) an affidavit

(a) M 741

(b) *Kuppayammal v Ammani*, 22 M 345. As to what is meant by due execution see *Woomesh v Rasmont*, 21 C 679, *Sarat v Sakhi*, 8 Pat 382, 33 C W N 374 P C

(c) *Sarada v Tilgna* 3 Pat L J 415 46 I C 117

(d) *Ghellaal v Nanda* 21 B 335

(e) *Gori Lal v Baij Nath*, 28 A L J 1524, *Bua Ditta v Dett Ditta*,

132 I C 527.

(f) *Re Abraham* 21 B 139

(g) *Kuppayammal v Ammani*, 22 M 345

(h) *Re Lakshminarayana* 25 M 515

(i) *Re Ardull*, 26 C 404, 3 C W N 293

(j) See Court Fees Act S 19 Rules of the Calcutta High Court

(k) *Re Courtjon*, 25 C 65. *Omissa v Adm Genl*, 25 C 54

of valuation in the form set out in Schedule III of the Court Fees Act, (r 4) The payment of the *ad valorem* fee may be postponed till caveat, where it has been filed, has been disposed of The Judge may require proof of the identity of the deceased or of the party applying for the grant (r 5). Where a will refers to any paper, *etc.*, it should be produced to ascertain whether it is entitled to probate, (r 8). The name, abode, description and occupation, if any, of the petitioner is to be given in the petition (r 34). Ordinarily, probate duty is to be paid along with the application for probate (r 4), under the Court Fees Act the grant will not be made till the duty is paid

7. Succession duty. The succession duty is payable before the order for grant of probate or letters of administration is made but not necessarily payable at the time of the application for such probate (a) Probate duty is payable only on the assets which at the testator's death are in British India (b) Fund over which the deceased had a power of appointment is liable to probate duty (c). The duty is payable under the Court Fees Act as amended by Acts XI of 1899 and VII of 1910 not on the gross value of the property but on the net value obtained after deduction of debts and expenses (d). Probate duty is to be regulated by the value of the property at the time of the application and not at the death of the testator. In estimating their value their present value must be taken (e)

8 Miscellaneous An application for probate has been allowed to be amended so as to convert it to a petition for letters of administration with the will annexed (f) An order of a District Judge granting or refusing probate of a will on an application made under this section is a decree and is appealable as such (g). A Court cannot decline to grant letters of administration with the will annexed (see S 278 n 7) There is no law which provides that a petitioner for letters of administration with the will annexed must produce it from his own custody and with the petition It is quite sufficient if he has an interest in the administration of the estate and can establish the existence of the will and, if necessary, can secure the production thereof by the person in whose possession it is (h)

277. (S. 245. P 63) In cases wherein the will, copy or draft, is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed ;

In what cases translation of will to be annexed to petition Verification of translation by person other than Court translator

- (a) *Re Aradhoney*, 5 C. W. N. 261, per contra, *Re Omda Bibee*, 26 C. 407, 3 C. W. N. 392.
 (b) *Re Ashraff*, 21 B 139 (see cases cited to)
 (c) *Re Lakshminarayana*, 25 M. 515
 (d) *Re Quinborough*, 22 C. L. J. 160. *Collector Sec. v Nirode*, 17 C. W. N. 21 cited from, *Re*

- Kerr*, 18 C. W. N. 121
 (e) *Dy Commissioner v Jagadish*, 6 Pat. L. J. 411. 62 L. C. 513
 (f) *Rappayammal v Annand*, 22 M. 345
 (g) *McCourt v Stephens v. Garnett Orme*, 35 A. 44
 (h) *Bas D'its v Der D'its* 132 L. C. 527.

or, if the will, copy or draft, is in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner, namely —

“I (A B) do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof”.

Change The words the will copy or draft' have been taken from S 63 of the Probate and Administration Act In the Succession Act S 245 the word will' alone occurs

278 (S. 246. P 64) (1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—

Petition for letters
of administration

- (a) the time and place of the deceased's death ,
- (b) the family or other relatives of the deceased and their respective residences ,
- (c) the right in which the petitioner claims ,
- (d) the amount of assets which are likely to come to the petitioner's hands ,
- (e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge , and
- (f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate

1 Change This clause is based on section 246 of the Act of 1865 and section 64 Act V of 1881 Here again there is a discrepancy between the two sections Under section 246 a petition must state that the deceased left some property within the jurisdiction of the District Judge or District Delegate to whom the application is made Under section 64 in the case of an application to a District Judge the petition must state either that the deceased at the time of his death had a fixed place of abode or had some property situate within the

jurisdiction of the Judge The Bill follows the language of section 246 As a slight change in the law is involved attention is drawn to the point, and similarly to the fact that the words 'a fixed place of abode' are used in the Bill in this clause also in order that the wording of the clause may be consistent with the wording of clause 274 Furthermore, although section 244 requires in the case of an application to a District Judge that the petition should state that the deceased had 'his fixed place of abode' within the jurisdiction of the Judge, that section in the case of an application to a Delegate requires that the petition shall state that the deceased 'resided' within the jurisdiction of the Delegate This discrepancy is apparently explained by the fact that the paragraph was inserted by the District Delegates Act, 1881 (VI of 1881) Section 62 on the contrary, uses the phrase 'fixed place of abode' in both places It seems doubtful whether it is necessary to maintain the discrepancy in the language of section 244 and the Bill uses 'fixed place of abode' in both places but it seems that the attention should be drawn to the point"—Notes on Clauses

2 The section It will be found on a comparison with the provisions of S 276 that it is necessary to mention certain further particulars in an application for letters of administration *e g*, cl (a) place of death cl (b) and cl (c) and of course all reference to wills is omitted

3 Cl. (c) As soon as the petitioner states the right in which he claims, the objector is entitled to deny that right by challenging the pedigree upon which the petitioner relies The objector cannot shew his own preferential title unless he was himself an applicant for the grant in which case and in which case alone, the court is bound to try that issue (a) A member of a joint Hindu family with a deceased person is not competent to apply for letters of administration to that person's estate In such a case the estate passes by survivorship and there is nothing left to administer (b)

4 Cl (d) It is not necessary for the Probate Court to decide what assets are likely to come into the hands of the applicant for purposes of administration, but it is the duty of the court in granting the letters to consider whether there is any estate whatever to be administered (c) Where administration is complete assets in the hands of an administrator are held by him as heir (d) The Administrator General is entitled to a commission on 'collection of assets' made by him These words do not, in connection with the Administrator General's Act, mean realisation by sale or actual receipt or possession, yet they imply the doing of some act in connection with the assets whereby the Administrator General incurs trouble, expense or responsibility (e) An inventory of the entire property of a testator need not be annexed to an application for letters of administration with the will annexed (f) The Court has only to be satisfied, on an

- (a) *Debendra v Surendra* 54 I C. 807, 811, 1 Pat. L. T. 19
 (b) *Uttam Devi v Dina Nath*, 51 I. C. 651, 56 P. R. 1919
 (c) *Lalit v Baikuntha* 14 C. W. N. 463, 5 I. C. 395
 (d) *Re Nuning* 3 C. W. N. 635

- reld. to in *Lalit v Baikuntha*, 14 C. W. N. 463
 (e) *Re Courjon*, 25 C. 65 See S 276 note.
 (f) *Garbachan v Satwant* 90 I. C. 620

application being made to it for probate or letters of administration that the appropriate duty has been paid on the net valuation of the estate as set forth in the affidavit of the applicants. It is no part of their duty to check the correctness of the valuation (a)

5 Omission of particulars Where a petition for letters of administration did not contain all the particulars required by the section but there was another petition and also an application which contained those particulars *held* they together constituted sufficient compliance with the section (b) See Calcutta High Court Rules 9, 10 and 11

6 Question of title A Probate Court can go into a question of title for the purpose of determining a preferential right to a grant but not where a paramount title is set up by one of the contesting parties (c) A grant of administration does not decide any question of title (d)

7 Delay in making an application Delay in making an application for a grant of letters of administration should put a Court upon enquiry whether there is anything to be administered (e) but not where the application is for letters of administration with the will annexed for it is of paramount necessity that the will should be established and the Court cannot decline to exercise that function (f) unless it finds that the will was not executed by the testator or for some reason or other was invalid (g)

279. (S 246 A P 65) (1) Every person applying

Addition to state
ment in petition etc
for probate or letters
of administration in
certain cases

to any of the Courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon

The section. The section was added by Act VIII of 1875 s 4 as S. 246 A to the Succession Act of 1865 and was repealed and reenacted in its present form by Act VIII of 1903 S 2 (5). See also in this connection the testamentary rules of the various High Courts

280. (S. 247. P. 66). The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner, namely.—

Petition for probate, etc., to be signed and verified “I (A.B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief”

The section The provisions of this section may be compared with those of the C. P. C., O VI rr. 4 15 The Administrator General is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of the Administrator General's Act (III of 1913 S^o 292) His signature is enough on a petition for letters of administration (a)

Subscribe In section 51 of the Civil Procedure Code of 1877 the word *subscribed* was originally used. But by subsequent amendment the word *signed* was substituted for it, and that word is still in use “The word *subscribed* has not been defined It signifies the idea of signing with one's own hand But the word *signed* as defined in several acts and explained by judicial decisions, includes *marked*” (b)

281. (S. 248 P. 67). Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely.—

Verification of petition for probate by one witness to will “I (C. D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence).

The section. For proof of documents required by law to be attested, see Evidence Act Ss 68-71 (c) This section requires an additional formality, viz., a verification of the application for probate by an attesting witness (when procurable). This provision is directory and not mandatory, so that non-compliance with it is not fatal (d)

(a) *Re Aodall*, 26 C. 404, 3 C. W. N 298
(b) M 746.

(c) See *Surendra v. Ramee Das*, C 1043, 24 C. W. N 860
(d) *Ram Singh v. Murtibai*, 68 I

Verification Under the English rule an affidavit of at least one of the subscribing witnesses is necessary if there be no attestation clause in the will or no statement alleging compliance with the statutory requirements. This affidavit must then show that the will was executed in conformity with the statute (a)

But this rule may be dispensed with if the witnesses are dead or if for other reasons no affidavit can be obtained from either of them (b). In such cases resort may be had to other persons, if any who were present at the execution of the will if no affidavit by any such person can be obtained an affidavit must be filed stating that fact identifying the handwriting of the testator and the subscribing witnesses and showing circumstances if any which raise a presumption in favour of due execution. In the absence of any evidence of due execution a will may be admitted to probate if all the persons prejudiced thereby are of full age and consent (c)

The above rule has been adopted by the Bombay High Court (r 563). There is no definite rule laid down by the High Court of Calcutta. So cases on this point are conflicting (see unreported cases cited in Mr Kinney's edition 490 1). R 33 of the Calcutta High Court says that so far as they are applicable English practice and procedure are to be followed

282 (S. 249. P. 68). If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an offence under section 193 of the Indian Penal Code

Punishment for false averment in petition or declaration

Change The words deemed to have Penal Code have been substituted for the words 'subject to punishment according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence'

283. (S. 250. P. 69) (1) In all cases the District Judge or District Delegate may, if he thinks proper,—

Powers of District Judge

(a) examine the petitioner in person, upon oath,

(b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be,

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration

(a) *Re Johnson* 2 C. L. 341
(b) W 206 *Re Luffman* 5 No of
Cas 183 *Re Dickson* 6 No of

Cas 278 refd to
(c) Mortimer Probate Practice 441 2

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- (b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be,
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(a) *Re Johnson* 2 Curt 341
 (b) W 206 *Re Luffman* 5 No of
 Cas 183, *Re Dikhan* 6 No of

Cas 278 *reld to*
 (c) Mortimer Probate Practice 441 2

(2) The citation shall be fixed up in some conspicuous part of the court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

1. The section. The section lays down the procedure that the District Judge or District Delegate may, if he thinks fit, adopt for having a will proved. No grant can be made unless the will has been proved in accordance with law, the Court must be satisfied that the will has been duly executed and attested (a). For this purpose a discretion is given to the Court as to whether it should avail itself of any of the provisions of this section for proof of the will. Ordinarily such steps need not be taken where there is no dispute regarding the grant of probate, when in England a grant in common form would be made (b). But as there is one mode of grant recognised by the courts in this country so one method of proof is laid down in this section.

2. Modes of proving a will. Following the analogy of English law it has been said that in a proceeding for probate of a will, the will must be duly proved either in common form or *per testes*, if the proceeding be contentious it must be proved in the latter, i.e., solemn, form. No grant of probate can be made merely on the consent of parties, as no grant can be made unless the will be proved in some form (c).

A will is proved in common form, i.e., summarily, if there be no opposition or contention. Such proof is *ex parte* but to the satisfaction of the Judge, who can know nothing of the circumstances or of the state of the family (d). "When therefore the genuineness of the will is not in question, it is proved by the executor, who brings it to Court and his witnesses averring that the testament exhibited is true, whole, and last will and testament of the deceased, the Judge thereupon, and sometimes upon less proof, does annex his probate and seal thereto" (e). No person interested need be cited for this mode of proof. A grant may be made in

(a) *Amees v. Mohanund*, 6 C. L. J 453.

(b) See *Komolochun v. Nilruttun*, 4 C 360; *Durgagall v. Saurabini*, 33 C. 1001.

(c) *Menmohini v. Banga*, 31 C 357,

362.
(d) *Komolochun v. Nilruttun*, 4 C. 360, 364, *Phanindra v. Nagendra* 39 C. L. J 569, 84 I C.

(e) W. 232 33 11 Ed.

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down in Court the proceedings were held to be defective (a) In the Original Side of the High Court oral testimony is dispensed with in uncontested cases (b)

5 Evidence The only issue in a probate proceeding relates to the genuineness and due execution of the will and it is exclusively the province of the Judge to come to a decision on this issue on the evidence produced before it No probate can be granted till the issue is decided in favour of the will (c) Due execution implies not merely the fact of execution by the testator and attestation by witnesses as required by Statute but also that the testator was in such a state of mind as to be able to authorise and to know he was authorising the execution of a document as his will and further he knew and approved of the contents of the instrument (d)

In ordinary cases execution of a will by a competent testator raises the presumption that he knew and approved of the contents of the will his competency also will be presumed but where the mental capacity of the testator is challenged the Court ought to find upon the evidence that the testator was of sound disposing mind and did know and approve of the contents of the will (e)

Strict affirmative proof of attestation is not absolutely necessary if the circumstances are such as to warrant the Court in reasonably concluding from those circumstances that the will has been duly attested probate may be granted (f) A regular attestation clause is not necessary but its requirements (S 50) are presumed to have been satisfied when a document which on the face of it purports to have been executed as a will and attested is proved to have been duly executed in the presence of witnesses (g)

Before any grant of letters of administration with the will annexed is made, the Judge must require strict proof of the execution of the will It is not enough for the witnesses to say that they saw the testator sign the will and that he was in his senses It must also be proved that he understood the contents of the paper to which he was putting his signature and for this purpose it should be shewn that the will if not written by himself was read over to him (h) Proof necessary to establish a will is not an absolute one but such as would satisfy a prudent man The propounder must explain away suspicious circumstances (i)

In contested cases stricter proof is necessary than in uncontested because every consideration which ought to induce the Court to refuse probate of the will must be taken into account (j) The propounder must prove the will by evidence as good as that which is required to prove any other instrument transferring

(a) *Ramgopal v Radhakrishna* 3 C. L. J. 37 n 10 C. W. N. xcv

(b) *Re Nobodoo ga* 7 C. L. R. 387

(c) *Monmohini v Banga* 31 C. 357
Ameer Chand v Mohanund 6 C. L. J. 453

(d) *Womesh v Rashmohini* 21 C. 279
Padma v Dharma 15 C. W. N. 728

(e) *Womesh v Rashmohini* 21 C. 279
290 see *Waring v Waring* 6 Moo. P. C. 341
Surendra v Ranees Das 47 C. 1043 24 C.

W. N. 860 *Paul v Thomson* 59 I. C. 535

(f) *Wright v Sanderson* 9 P. D. 149
Sibo v Hemangini 4 C. W. N. 204 fold in *Natal Chand v Nagant* 10 C. L. J. 499

(g) *Natchand v Nagant*, 10 C. L. J. 499

(h) *Kuppayammal v Amman* 22 M. 345

(i) *Surendra v Jahnacl* 56 C. 390

(j) *Annada v Jugutmont* 6 C. L. R. 176

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in support of the instrument (a) Thus permission to a solicitor who the High Court to charge for professional services done by him or his firm and on the testator's business for services rendered in connection

5 Evidence is a suspicious circumstance But there is no rule of law as to the admissibility or description of evidence by which the Court must be free of suspicion excited and the weight of the burden imposed can be granted. Making the benefit must depend largely on the circumstances of the case (b) The rule that the Court will not pronounce in favour of propounders have proved it to express the real mind of the testator is limited to cases where the will was prepared by or on the instructions of the testator and taking benefits under it, but extends to all cases in which circumstances exciting suspicion exist. Benefit in this connection does not mean a pecuniary benefit such as a substantial legacy (c) The presumption that there is one inherent in the transaction itself and not doubt arising from the fact of testimony Where a well grounded suspicion arises the Court must pronounce in favour of the will unless the suspicion is removed (d) The existence of suspicious circumstances rouses the vigilance of the Court (e).

In ordinary cases, if a will was not registered, though registration is not compulsory, that no lawyer testified it, especially in view of the provisions practically disinheriting those circumstances and the daughter of the testator and the serious nature of the A regular will were regarded as constituting suspicious circumstances (f) Where the testator is blind (g), or his capacity at the time of the execution is doubtful (h), to have a will is inofficious (i) the suspicion of the court is roused (j) A party who in the presence of a will under suspicious circumstances is bound to give the Court the complete information for its guidance and satisfy it beyond all reasonable doubt that the testator was fully cognisant of its contents and in a condition to make a will and did exercise thought, judgment and reflection respecting the act of doing (k) Suspicion, to justify a Court in refusing to grant probate, arises from the contention of the parties and the evidence in the case (l) to which is a presumption of genuineness of a will which is supported by the evidence of persons who derive no advantage from the will (m) When a will is established the Court cannot refuse to grant probate on the ground that a will is invalid or some of the bequests are void These must be

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"every conveyance must be attested by two witnesses, one of whom must be a good and lawful husband or wife of the testator." *Butlin*, 2 Moo P. C. 1007, *Fulton v Andrew* L R 10 448, *Low v Gurthrie* 1 A C 278, *Dwijendra v Basant* 21 C L J 287, *Ramgoobair v Sivaraman*, 8 Rang 179 P.C., *Chandika v Bhugwandaz*, 32 I A 29 B 530, see *Chandika v Kumari v Sakhi Chand*, 8 27 A L J 137, 33 C 34 C. L. J 3 Moo P. C. *Baker*, 3 Moo v Golok

- 21 C L J 287
(f) *Ramanandi v Kalawati* 55 I A 18 7 Pat 221
(g) *Barlow v Robins*, 3 Phill 455 n.
(h) *Barr v Butlin* 2 Moo P. C. 480, *Browning v Budd*, 6 Moo P C 435
(i) *Tytrell v Painton*, 1894 P. 151 See ante See *Shama v Kheltramant* 27 C 521
(j) W 220-1. 12 Ed
(k) *Dwijendra v Golok* 21 C L J 287, *Womesh v Rashmoni*, 21 C 279, 303, on app 25 I A 139 *Paul v Thomson* 59 I C 535
(l) *Nagendra v Saral*, 51 I C 335, *Jaleswar v Juthan*, 86 I C. 642
(m) *Romesh v Rajani*, 21 C. 1, 7.

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10. Signature. "Proof of the testator's signature is all that is needed, but in case of doubt or dispute the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect" (e). In a contested probate proceeding the ability of the testator to affix his signature to the will in several places with a firm hand decided the genuineness of the will (f) The mere fact of an attesting witness repudiating his signature will not invalidate a will, if it can be proved by other evidence of a reliable character that the evidence is false (g) The opinion of a handwriting expert on signature who was not called as a witness and not subjected to cross-examination cannot be taken into consideration (h). Signature or initials of the testator and two witnesses are sufficient to prove an interlineation on obliteration (i).

11. Knowledge and approval of testator of contents of a will. That the testator did know and approve of the contents of the alleged will is part of the burden of proof assumed by every one who propounds a will. This burden is satisfied, *prima facie*, in the case of a will of a competent testator. But if those who oppose it succeed, by cross examination of the witnesses or otherwise, in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate (j). The burden of proving knowledge and approval is always on propounding the will though formal proof may suffice when no objection is raised. The onus of proof is increased by circumstances which throw doubt on the will propounded (k). Before grant of probate or letters of administration with the will annexed the Judge should insist on strict proof that the testator signed the will and was in his senses at the time that he understood the contents of the will. It is impossible to

v. *Balkuntha*, 66 I

v. *Golak*, 21 C. L. J

v. *Hanuman*, 36 C. 833,

v. *Kalavati*, 7 Pat.
; 32 C. W. N. 402.

v. *Alpna*, 49 I A. 413,
495, 500; see *Deidas*
78 I C. 104.

are, 18 I. A. 132, 19

C 65 63, 75 sq; see *Ramesh v*
Rajani, 21 C. I P. C.

(g) *Nubo v Joy* 22 W. R. 189

(h) *Padma v Dharma*, 15 C. W. N
728

(i) *Re Blessill*, 5 P. D 116

(j) *Cleare v Cleare*, 1 P. & D. 655;
Browning v Budd, 6 Moo P. C.
435

(k) *Balkrishna v Gopikabal*, 7 Bom.
L. R. 175; *Dagambar v. Nanayan*,
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agitated in a regular suit. The Court has no discretion as regards the withholding of probate (a), but has discretion in the matter of grant of letters of administration with the will annexed (b).

8. Illness of testator. Burden of proof. It is well settled now that it need not be proved that a testator, in order that his will may be found good by a Court, was in a perfect state of health, or, that his mind was so clear as to enable him to give complicated instructions. It is sufficient if it is proved that he was able to give the outlines of the manner in which his estate was to be disposed of, and he was able, when the document was read out to him, to understand that his instructions in the main had been complied with (c).

The onus of proof is on the applicant for probate to satisfy the conscience of the Court that the testator had a sound disposing mind at the time of making the will. Ordinarily it is sufficient to prove that the testator had approved of the will, but where the testator is enfeebled in body and mind by illness it is necessary for the propounder to prove that the instructions for the will were given by the testator and that the terms were understood and approved by the testator (d). The onus of proof that the testator was not a minor rests on the propounder (e). The burden of proving a will is on the person who sets it up and where the Court finds a will not to be a genuine document it ought to hold that the alleged will is not proved, to declare it to be a forgery is going beyond what the law requires (f). As regards nuncupative wills it is necessary to prove with the utmost precision the words on which reliance is placed with every circumstance of time and place (g).

9. Absence of material witnesses or documents. Where there is sufficient evidence to establish the genuineness of a will and the capacity of a testator to make it, the absence of material witnesses is of no consequence (h). But where the evidence is not sufficient the absence of material witnesses or documents strengthens the suspicions as to the genuineness of the will as also does the fact of secrecy, *eg.*, that near relations were not consulted or told anything about the will (i). A will has been held not satisfactorily proved on the ground among others that several material witnesses had not been called and no reason given why they had not been called (j). But where there are several, the one not called need not be

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(a) *Prasannamoyl v. Balkuntha*, 66 I C. 782

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(d) *Ramanandi v. Kalawati*, 7 Pat. 221, 233; 32 C. W. N. 402.

(e) *Ram Gopal v. Alpna*, 49 I A. 413, 418 44 A. 495, 500; see *Devdas v. Mamooji*, 78 I C. 104.

(f) *Bama v. Tara*, 18 I. A. 132, 19

C. 65 68, 75 sq; see *Ramesh v. Rajani*, 21 C. I P. C.

(g) *Nuba v. Joy*, 22 W. R. 189

(h) *Padma v. Dharma*, 15 C. W. N 728

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- (a) *Hotchand v Navalrai* 121 I C 173 following *Brijnath v Chandar* 19 A 458 *Pran v Jado* 20 A 189
(b) *Dy Commissioner v Jagadish* 62 I C 513
(c) *Gordhandas v Bal Suraj* 23 Bom L R 1068 64 I C 257
(d) *Harwood Baker* 3 Moo P C 262, 290 *Brayestean v Rasik* 65 I C 381
(e) *Rajindar v Ramjowal* 5 Lah 263
 Baikuntha v Prasannamoyi 44 Cal L J 679 72 I C 286
 1 C on app 11 49 C 132 66 I

- C 782 (See the judgment of the Cal H C for the standard of proof necessary to prove a will)
(g) *Beer Pestab v Rajindar* 12 M I A 1 28 9 W R P C 15 cited in *Narain v Gaiando* 45 I C 183 85 P W R 1918
(h) *Bama v Tara* 16 I A 132 19 C 65 78
(i) *Rashmoni v Umes* 25 I A 109 25 C 824 832 on app from 21 C 279
(j) *Bindeshri v Balsakha* 61 I C 431

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- C 65 68 75 sq see *Romesh v Rajani* 21 C I P C
 (g) *Nubo v Joy* 22 W R 189
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 (j) *Cleare v Cleare* 1 P & D 655
Browning v Budd 6 Moo P C 435
 (k) *Balkrishna v Gopikabai* 7 L R 175 *Digambar v* 13 Bom L R 38

enunciate any specific standard of proof, but it must be of such a nature as the circumstances of the case indicate as proper and necessary (a). Where in a will, otherwise validly executed, certain provisions are introduced without the knowledge and approval of the testator, they may be rejected and probate granted of the remainder of the will (b). So it has been said ordinarily 'due execution' implies knowledge and approval (c). But knowledge and approval of the testator is not to be insisted upon in all cases. Thus they have been dispensed with where a will is prepared according to instructions, but the testator is prevented by illness from reading the will as prepared and executes it in the belief that effect has been given to his intention so far as the disposition of his property is concerned (d).

In other words, if the testator signs the will believing it to be in accordance with his instructions, it is good and it is not necessary to show that he was capable of understanding all the provisions thereof. These are exceptional cases and it must be proved that the will was prepared according to instructions (e). Where preparations had been made for a will while the testator's mind was in vigour and a draft prepared and the testator showed it to members of his family, asked for fair copy to be made of it then, as in the above cases, execution of the will with the knowledge that it had been prepared according to his instruction and without the full measure of testamentary capacity will make the will good (f). Even where a testator declares 'I do not know what you have put down, but I am quite ready to execute it, the will has been held to be good (g).

12 Presumption in favour of a will Where a will has been acted upon and recognised by the members of a testator's family for a very long time there arises a strong presumption in favour of its genuineness although not conclusive (h), so also where a will is supported by the testimony of persons who derive no advantage from the will (i). There is a presumption of due execution where a will soon after its execution was publicly exhibited in Court and submitted to some investigation and proof and was proved though *ex parte* (j). The presumption of law is in favour of a will 'in every respect a natural will and in accordance with his (testator's) feelings and tenour of life'. "In the case of a will reasonable natural and proper in its terms, it is not in accordance with sound

- (a) See *Tarachand v Debnath*, 10 C. L. R. 550; *id.* to in *Kuppayammal v Ammal*, 22 M. 345; *Keshev v. Vithal*, 89 I. C. 468.
 (b) *Sarat Kumari v Sakhi Chand* 31 Bom. L. R. 270, 33 C. W. N. 374, 113 I. C. 471 P. C.
 (c) *Womesh v Rashmoni*, 21 C. 279.
 (d) *Perrera v Perera*, 1901 A. C. 354; *Parker v Felgate*, 8 P. D. 171; *id.* in *Kuzum v Sathishendra* 13 C. W. N. 1128; and in *Aulia Bhai v Alauddin* 3 A. L. J. 519.
 (e) *Karunaratne v Ferdinandus*, 1902 A. C. 495; *Rashmoni v Umesh*

- 25 C. 824, 832, 2 C. W. N. 321.
 (f) *Rashmoni v Umesh*, 25 C. 824, 2 C. W. N. 321 P. C.; *Ailmont v Umanath*, 10 C. 191 P. C.; see *Romesh v Rajani*, 21 C. 1, 5.
 (g) *Cunliffe v Cross* 3 Sw. & Tr. 38.
 (h) *Rajendra v Jogendro* 14 M. I. A. 67, 7 B. L. R. 216.
 (i) *Romesh v Rajani*, 21 C. 1, 7 P. C.
 (j) *Saorendro v Heera*, 12 M. I. A. 80, 10 W. R. P. C. 35, 39.

rules of construction to apply to it those canons which demand rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety' (a)

13 Compromise, etc Compromise means abandonment of opposition and consequent issue of probate (b) Probate may be granted in common form in consequence of a compromise between parties and it is binding on them (c), but not on strangers to the proceeding (d) But any compromise which excludes evidence in proof of a will is unlawful. No grant of probate is valid unless the will be proved in Court in some form. Probate cannot be granted by consent without proof of the factum, i.e. the due execution of the will, the consent of parties that probate be granted can not give validity to a grant. The Court must be satisfied that the will was duly attested and executed before the grant is made. Probate cannot be granted simply because the caveator consents (e) A compromise is inoperative being based on a mistaken state of facts on subsequent discovery of a will (f). An executor cannot refer the factum of the will to arbitration (g) Probate cannot be sought to be revived by compromise of the revocation proceedings (h)

14 Lapse of time A grant of probate will be rendered useless if a long time is allowed to elapse before a final order for a grant is made (i) Discrepancies in evidence are discounted by lapse of time (j) Allowance should also be made for loss of evidence (k) The Court is bound to scrutinise the evidence with care when there is a delay (17 years in this case) in putting forward a will for probate, but the will is not incapable of being proved for that reason (l) Probate should not be refused merely on the ground of the delay in the production of the will (m) A will is not often produced for probate. Where a will was challenged 25 years after execution, the Court observed, paucity of evidence become intelligible (n) The Limitation Act does not apply to an application for probate, but it is no doubt usual for the Court to demand an explanation when there is unreasonable delay in applying for probate in order to come to a conclusion as to the genuineness of the will propounded (o)

- (a) *Jagran v Kuar Durga*, 36 A 93, 18 C. W. N. 521, *Bamasundari v Tarasundari*, 19 C. 65, 72.
 (b) *Monmohini v Banga*, 31 C. 357.
 (c) *Kunja v Kailash*, 14 C. W. N. 1068.
 (d) *Sarada v Gorindo*, 12 C. L. J. 91 (see cases discussed), see S. 263 n.
 (e) *Kamal v Narendra*, 9 C. L. J. 19, *Monmohini v. Banga*, 31 C. 357, *fold in Sarada v Gobinda*, 12 C. L. J. 91, *foling Ameerschand v Mohanund*, 6 C. L. J. 453, *Rajji v Vishnu*, 9 B. 241, *Ghellaibhai v Nandubai* 21 B. 335. Proof of a will is not a question of bargain and the parties are not bound by any agreement and before the order discharging the caveat is completed the court can

- reopen the proceeding *Satkarhi v Hazarilal*, 57 C. 1025.
 (f) *Alderson v Alderson*, 9 C. W. N. cxxxix.
 (g) *Ghellaibhai v Nandubai*, 21 B. 335.
 (h) *Sarada v Gobinda*, 12 C. L. J. 91.
 (i) *Re Shumtee*, 24 W. R. 103.
 (j) *Soorendro v Heera*, 12 M. I. A. 81, 10 W. R. P. C. 35, 39; *Gangamoyl v Trolluckhya*, 33 L. A. 60, 33 C. 537.
 (k) *Rajendro v Jogendro* 14 M. I. A. 67, 15 W. R. P. C. 41; *Kali v. Ishan*, 9 C. W. N. 49, 51, 53.
 (l) *Bhadini v Hriday* 22 C. W. N. 424 45 I C. 187.
 (m) *Makunda v Bholanath*, 43 L. C. 195.
 (n) *Chandha v Mahto* 40 C. L. J. 466.
 (o) *Gnanamatha v Vena*, 17 M. 379 See S. 263, note.

15. Improbability. When a will is attacked on the ground of improbability of its execution, the improbability must be clear and cogent and approach very nearly to impossibility in order to outweigh the affirmative evidence of due execution (a).

16. Attestation by servants. To say of a will that it is invalid because it is attested by the testator's servants 'is a proposition which verges too closely on the absurd to be seriously entertained'. Such attestation, however, may give rise to suspicion under certain circumstances (b). A will is not open to suspicion because it is not attested by people living in the neighbourhood of the deceased. It is a matter of speculation to settle who are most likely to be taken as witnesses (c).

17 Refusal of Probate. Application for probate cannot be rejected upon any internal evidence contained in the will itself (d), nor because the testator had no power to dispose of some or even all the property he purported to dispose of (e), because the probate court cannot go into questions of title (See post)

18 Mistake in date. A mistake in the date which a will bears is not one which affects the execution of the will, if the mistake can be satisfactorily explained (f).

19 Acquiescence. A minor may be debarred by long acquiescence and delay or by subsequent ratification of the dispositions of the will from putting the executor to proof of the will in solemn form or from contesting its genuineness (g). Ordinarily, however, by acquiescence or acceptance of the legacy a next of kin does not lose the right to have the will proved in solemn form (h).

20 Declarations by the testator. A declaration by the testator as to the execution of a will is not admissible in evidence in place of proper and regular evidence of the fact of its execution (i).

21 Title. The Probate Court cannot go into questions of title or the validity of dispositions made by a will (j), or the validity of an adoption (k).

- (a) *Chateenarain v Ratan* 22 I A 12 23, 22 C 519 520
 (b) *Chateenarain v Ratan* 22 I A 12 22 C 519 cited in *Jagran v Durga* 41 I A 76 18 C W N 521, 525, *Dulhin v Haranandan* 20 C W N 617, 33 I C 790 P C.
 (c) *Chandika v Madho* 40 C L J 466
 (d) *Re Shuslee*, 23 W R 103
 (e) *Barot v Bal Mull* 18 B 749, *Re Dhuramul*, 14 Bom L R 1031
 (f) *Anwar v S. S. for India* 8 C. W. N 821, 31 C. 845
 (g) *Kunja v Kallash* 14 C. V. 1055, *Mohan v Braug ton*, 156 Ind. 10, see *Draam v I* 3 Adj 243

- (h) *Bell v Armstrong* 1 Add 365, *Mcerryweather v Turner*, 3 Curt 802
 (i) *Eyre v Eyre* 1903 P 131, *Atkinson v Morris*, 1897 P 40, 48 relied on
 (j) *Hormusji v. Dhanbaji* 12 B 164, *Bal Gangadhar v. Sakwarbat*, 26 B. 792, *Chintaman v Ram Chandra* 12 Bom L R. 694, *Brif Nath v Chandar* 19 A 458 (see cases relied to); *Behary v Juggo*, 4 C. I., *Arumoyl v Mohendra* 20 C 888, *Nishantha v Asutosh* 17 C. W. N 613, *Sonthagammal v Kom* 54 M L J 382, *Mahar* Ram Ratan, 35 I C. 411 v Nathan 123
 (k) *Maha* m Ratan 33 I C 416

Therefore the question whether there is any property capable of being bequeathed does not arise in probate proceedings (a) and a will cannot be ignored on this ground (b). Similarly in granting letters of administration the Court does not go into the question of title or whether the property left was joint or separate, the only question before the Court being who is the heir of the deceased (c). It is sufficient if the applicant is, according to the rule for the distribution of the estate of the deceased, entitled to the whole or a part of the property left by the deceased (d).

The testamentary Judge can adjudge no civil rights between the parties. A declaration adjusting such rights which will have the effect of rendering the will inoperative and invalid can be made by the District Court in the exercise of its civil jurisdiction or the High Court in the exercise of its original civil jurisdiction (e). Proceedings for letters of administration should not be allowed to become protracted by entering into questions which cannot be finally determined in such proceedings (f).

22. Proceedings. A proceeding under the Probate and Administration Act is not a suit properly so called but takes the form of a suit (See S 293) according to the provisions of the Civil Procedure Code (g).

23. Estoppel. It has been observed that after a grant of probate a will cannot be set aside in equity on the ground that it was obtained by fraud on the testator. So in a subsequent suit the caveators cannot show that any particular clause in a will of which probate has been granted was inserted by undue influence (h). Where a person with full knowledge of his rights accepted the office of executor, obtained probate, and under its authority collected assets and otherwise so acted as to cause third persons to alter their position, he would be estopped from impeaching the will, or repudiating his fiduciary position or disputing the dispositions contained in the will (i). The fact that probate has not been taken out is immaterial. A legatee who abides by the terms of a will and takes a legacy under it is estopped from setting up a title contrary to its provisions (j).

(a) *Mont v Gourl*, 5 C L J 47 (Notes).

(b) *Re Dhuramsi*, 14 Bom L R 1031.

(c) *Mohun v Kishen* 21 C 344, *Re Raghoobur v Bahadoor*, 3 C. W N cclxxvii, *Durga v Radha* 14 C. W N cccxxxii, *Ochavaram v Dolatram*, 28 B 644.

(d) *Nahikanfa v Ashutosh* 17 C. W N 613 33 I C. 296 *Raghu v Pate* 6 C. W N 345, see also above cases.

(e) *Re Dhuramsi*, 14 Bom L R 1031.

(f) *Ma Kyn v Ma Shwe* 35 I A 266.

(g) *Arunmoyi v Mohendra* 20 C. 883, *Saroda v Gobindo*, 12 C L J

91, *Pratap v Kali*, 4 C W N 600 See S 263 note.

(h) *Allen v M Pherson*, 1 H L C. 191, fold in *Abbas Hossain v Kurutulain*, 31 C. 186.

(i) *Srinivasa v Venkata*, 29 M 239, 281 add in 38 I A 129 34 M. 257 fold in *Munisami v Maruthammal* 34 M 211 (executor estopped from setting up an adverse title to the property disposed by the will) fold. in *Numberunai v Veeraperumal*, 59 M L J 596 128 I C 689, *Ganga Din v Ram Prasad*, 26 A L J 62, *Jnanendra v Jitendra* 32 C W N 108, 107 I C. 70.

(j) *Probodh v. Hansh*, 9 C W. N 309.

He must bring into Court any sum that he may have received on account of his legacy before he can be permitted to dispute the will (a)

24 Interest The foundation of title to be a party to a probate or administration action is interest (b). Even the possibility of an interest is sufficient to entitle a person to become a party to the proceedings (c). A person disclaiming interest in the estate is not entitled to citation and has no *locus standi* in the Probate Court (d)

25 Citation Persons interested are to be cited to see the proceedings in order that they may be bound by them. If the persons cited do not choose to appear judgment will be given in their absence (e). A person who claims outside and independently of the will or claims adversely to the testator and disputes his right to deal with the property can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of this section (f). But this view has not been consistently followed (g). A brother of the deceased testator alleging to be joint with the deceased is not entitled to citation as he has no interest in the estate of the deceased (h), but a creditor of the deceased testator's son who in execution has attached the interest of the son in the property of the deceased has an interest sufficient to justify a grant (i). The words "claiming to have any interest in the estate of the deceased" have been construed to mean claiming to have an interest in the property left by the deceased. Accordingly it has been held that a judgment creditor who, but for the will, would in execution of the decree have a right to seize the property or that share of it which should descend to his debtor, is a person claiming an interest in the estate of the deceased (j). Special citations need not be issued to executors who have declined to act (k). When a will is propounded which alters the devolution of property, the District Judge should, in the exercise of the discretion vested in him as to the mode of issuing citations, direct special citations to be served on every one immediately affected by the will, but their absence will not make the proceedings defective (l). The issue of citation under this section is discretionary and so its absence does not

(a) *Bell v Armstrong*, 1 Add 365
374, *Braham v Burchell* 3 Add
243, 256 257

(b) *Crispin v Doglioni*, 2 Sw & Tr
17 See S 263 Notes

(c) *Hemangini v Haridas* 46 I C
593 (see Citation below)

(d) *Ram Das v Prem Das*, 10 Pat
817

(e) Tr & C 436, see *Ranmoy v Betty*
31 C. W. N 160 100 I C
177

(f) *Gopal v Ashulash*, 20 I C. 342,
Altiram v Gopal 17 C. 43,
Sri Gokind v Laljhar, 14 C. W.
N 118 2 I C. 492, *Balsab v*
Ganga, 1 C. L. J 258, *Puroshat*
v Palsanji 34 B 459, 6 I C
523 *old Brijdaban v Sureshwar*
10 C. L. J 263 3 I C. 178

Mohadeb v Benode 77 I C 534,
Khetramoney v Shyama 21 C
539 *distgd* (where it was held that
a reversionary heir was entitled to
citation), *Ram Das v Prem Das*
10 Pat 817.

(g) *Jammi v Aralia* 49 M 960, 98 I
C. 259 (see cases discussed)

(h) *Kalaji v Parmesher*, 39 I C 573
Chaloo v Lachmi, 125 I C 769,
Ramyad v Ram Bhaju, 10 Pat
812

(i) *Arahal v Narayana*, 34 M 405

(j) *Kishen v Salyenara*, 28 C 441

(k) *Hatchand v Narsim* 121 I C
173

(l) *Nutariny v Brahmamoy* 18 C. 45
citing *Amona v Hurm Lal* 8
C 570

vitiates the grant, (a), unless the Court was misled and did not direct the issue of citation because of untrue statements contained in the petition (b)

26 Limitation. There is no period of limitation prescribed for the presentation of an application for probate or letters of administration (c) But where there is great delay in propounding a will, the Court is bound to scrutinise the evidence very carefully (d)

284. (S. 251 P. 70) (1) Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

(S. 252. P. 71). (4) The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V

1 Chango The words made as nearly in Schedule V have been substituted for the words to the following effect — [here was set out the form of caveat which is now given in Schedule V]

2 The section S 250 of the Act of 1865 was amended by Act VI of 1881 s 5 and given its present form Compare the Court of Probate Act 20 & 21 Vict c 77 S 53 There is no provision in the Act for the discharge of a caveat (e).

3 Caveat. 'A caveat is a notice in writing lodged in the principal probate registry or in a district probate registry, that nothing is to be done in reference to the estate of the deceased named therein unknown to the party, or to the solicitor of the party, who has lodged the caveat Its object is to prevent the issue of any grant without notice to the caveator (f) A caveator has no locus stands to contest the validity of the dispositions made by the testator (g)

4 Object of caveat Some of the purposes for which a caveat may be filed are thus mentioned (h) —“(i) to give time to the caveator to make enquiries

(a) *Digambar v Narayan* 13 Bom L R 38

(b) *Shyama v Prafulla* 19 C. W N 682.

(c) *Bal Manohar v Manekji*, 7 B 213, *Kashi v Gopl*, 19 C. 45, 52, *Gnanamutha v Vana* 17 M 379

(d) *Bhadrani v Hriday* 22 C. W. N 424 426 (Delay of 17 years)

(e) *Gauri v Manraj* 41 L C. 705 The rules of the Calcutta High Court provide for its discharge when it is shown that the caveator has no interest.

(f) *Tr. & C. 343*

(g) *Rajamanickam v Farooq*, 11 C. 954

(h) *Tr. & C. 344*

and to obtain such information as may enable him to determine whether or not there are not good grounds for his opposing the grant, (ii) to give him an opportunity of raising any question in respect of the grant either on summons or on motion, (iii) to enable the caveator to apply for an order that the sureties to the administration bond shall justify (see S 291 note 5), (iv) as a step preliminary to an action or to the issuing of a citation

Where a caveat has once been filed no grant can issue until the caveat has been removed (a) The entry of caveat does not necessarily imply any intention to oppose the grant, it is merely a request that nothing be done in the matter of estate of A B deceased without notice to the caveator (b) But a person who intends to oppose the issuing of a grant of probate or letters of administration must either personally or by his solicitor enter a caveat (c) Mr Mazumdar however cites an authority (d) in support of the proposition that persons who have been served with the citation may oppose without filing a caveat If a caveator merely intends to require the executor to prove the will in solemn form he must not at the same time set up a defence of undue influence or fraud or any other matter If such defence be taken, and the caveator fail to substantiate his contention, he will be liable for costs (e)

If within 8 days from the entry of a caveat no affidavit be filed the caveat simply drops the matter never becomes contentious and the registrar of the High Court can proceed to grant probate or administration as if no caveat has been entered (f) As to when proceedings become contentious see S 286 note

In England a caveat remains in force for six months but may be renewed There is no similar provision made in this Act

5 Who can enter a caveat A caveat can be entered by any person having or asserting an interest in the estate of the deceased either by the party himself or his solicitors or an agent (g) Before a person can be permitted to contest a will, the propounder has a right to call upon him to shew that he has same interest (h) The actual entry of a caveat is a ministerial act (i) A person opposing a grant and therefore filing a caveat must have an interest in the property of the testator of the nature of a claim to succeed by inheritance A title adverse to that of the testator to any particular property is not sufficient for the purpose (j) The test is does the grant displace any right to which the caveator would otherwise be entitled (l) A person claiming to be joint with the deceased has no *locus standi* to contest the grant of probate, for probate does not confer any title to property

- (a) Tr & C 344
 (b) *Chotalal v Bai Kabubai* 22 B 261 265 following *Moran v Place* 1896 P 214, *Salter v Salter* 1896 P 291
 (c) H XIV. p 154 Tr & C 784 see *Tara v Deb* 10 C L R 550
 (d) *Bhaan Das v Mohant Ramsaran* 5 P W R 113
 (e) *Sanasilla v Narendra* 56 C 55
 (f) *Chotalal v Bai Kabubai* 22 B 261, 265 (This case also explains when proceedings can be said to be contentious)

- (g) Tr & C. 344 5 See *Gaur v Manraj* 41 I C. 705 (as to burden of proof)
 (h) *Rajamanickam v Farrar* 69 I C 954 (1922) M W N 626
 (i) *Re Panton* 1901 P 239
 (j) *Abhiram v Gopal* 17 C. 49
 (k) *Sambhagammal v Komalangi* 54 M L J 382 107 I C. 420 on app 59 M L J 579 128 I C. 476 (The interest must be an interest in the estate of the deceased i.e. there must be no dispute as to the title to the estate)

which the testator had no right to dispose of (a) The mere fact that a caveator is a legatee under a will gives him no *locus standi* either to denounce the will or to call for proof of it in solemn form (b)

285. (S. 253. P. 72.) No proceeding shall be taken

After entry of caveat, no proceeding taken on petition until after notice to caveator on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court may think reasonable.

The section The words of the section show that by the filing of a caveat a Probate Court is prevented from taking any step in the probate proceeding without first giving notice to the caveator. The rules of the Calcutta High Court provide for the issue of notice to the caveator calling upon him to file his affidavit in support of the caveat within 8 days of the service of notice when an application for probate or letters of administration is made after the filing of a caveat (c). In England on the filing of a caveat, certain steps are taken for which there is no provision made in India either in the Act or in the rules of the High Courts (d). The form of the caveat would seem to show that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator but objects either to the execution of the the will or to the proposed manner of dealing with any portion of the estate (e).

Time of filing a caveat. There is nothing stated in the Act about the time for filing a caveat. In *Grey v. Charusila* (f), a caveat was filed after letters of administration that had been issued were brought into Court in connection with revocation proceedings and after an order for re grant had been made, though the letters had not been actually re issued at the time when the caveat was filed. This would go to shew that a caveat may be filed at any time between the death of the testator or intestate and the actual issue of the grant. Caveats, according to the rules of the High Court of Calcutta, may be filed before or after application has been made for a grant of probate or of letters of administration. In the latter case the affidavit in support shall be filed within 8 days of the caveat being lodged, in the former case the Registrar, immediately the application is made, shall issue notice to the caveator to file his affidavit in support within 8 days.

Procedure. Upon the caveat being filed the proceedings shall be numbered as a suit. There may be a preliminary trial of issue, on the application of the

(a) *Chotoo v. Lachmi*, 125 I. C. 769

(b) *Rahmatullah v. Rama Rau*, 17 M. 373

(c) Ch. 35 r. 26 p. 418 (Remfry's Ed.)

(d) *Chotalal v. Bai Katalal*, 22 B. 261

(e) *Athiram v. Gopal*, 17 C. 48, 52.

(f) 38 C. 53, see *Safindra v. Sarala*, 27 C. L. J. 320; 45 I. C. 59 (caveats were allowed to be filed a second time after having been withdrawn before). In *Jarat v. Buxesar*, 39 C. 245, 249, the caveat was filed before the application for probate was made.

petitioners by summons to the caveator as to the caveator's interest and if the caveator be found to have no interest the caveat will be discharged and probate or letters of administration may be granted (Rules 24—30 and 34) On the death of one of two executors the estate vests in the survivor and it is open to the caveators to proceed against him alone (a) The Court can record a contract or agreement made between the parties in consideration of the withdrawal of the caveators' objection, but it is wholly powerless to enforce such a contract or agreement (b)

286 (S 253 A P 73) A District Delegate shall

District Delegate
when not to grant
probate or adminis-
tration

not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration

ought not to be granted in his Court

Explanation —“Contention” means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding

The section The section was added to the Succession Act of 1865 by Act VI of 1881 S 7 It has already been laid down in section 272 that the jurisdiction of the District Delegate in respect of grants of probate or of letters of administration is confined to cases where there is no contention The provision is repeated here and it is added that the District Delegate shall not also make a grant when it otherwise appears to him that the grant should not be made but this withholding of a grant does not amount to a refusal (See Ss 287 & 288) This first part of the section is explained and its substance amplified in Ss 287 288 and 289

Contention With a view to secure uniformity of practice it has been laid down in *Chotalal v Bai Kabubai* (c) that it would be a more correct procedure to treat not the entry of a caveat but the filing, within 8 days of such entry of an affidavit in support of the caveat as the point at which the petition becomes contentious On the filing of the affidavit a petition for probate or administration should be treated as having become a plaint in a suit and notice should be given to the petitioner Then the whole suit must be disposed of by the decree of Court even if the caveator do not appear in support of the caveat According to the rules of the Calcutta High Court Ch 35 r 23 the proceedings shall by order of a Judge upon application by summons be numbered as a suit But if the nature of the suit or proceeding be such that no contest is involved as in probate common form business—the suit or proceeding is non contentions If a contest is involved it is contentious The fact however that there is ultimately a decree by consent can not alter the nature and character of the suit (d)

To constitute a suit contentious it must be a suit which upon the face of the proceedings would appear to involve some contention as to the right of one

(a) *Gauri v Manraj* 41 I C. 705
(b) *Sarada v Triunda* 46 I C. 117
3 Pat L J 215

(c) 22 B 261
(d) *Annamalai v Alaiyandi* 29 M 426

or other of the parties in the immovable property, which is claimed in the suit, and whether there is such a contention may be gathered from the plaint itself, or the defence of the defendant, when it is put in (a)

The word 'contention' has been used in the same sense in the Transfer of Property Act (b). But there is this difference, viz, that a suit under the Transfer of Property Act, contentious in its origin and nature, remains so even if there be no appearance in opposition (c), whereas a proceeding under this Act is not contentious in its origin but becomes so on the filing of an affidavit in support of a caveat. Until opposition is entered probate proceedings do not properly become contentious and litigation cannot properly be said to have commenced until then so as to constitute a petition a plaint (d).

Litigation is commenced between the person propounding the will on the one side and the person opposing it on the other when the former issues writ and serves it on the caveator (e).

The essence of contention according to the Explanation to the section consequently is appearance with a view to oppose the proceedings. The withdrawal of the pleader from the case does not make the proceeding a non-contentious one (f), but the withdrawal of the opposition or of the party opposing a will transforms the proceeding into a non-contentious proceeding (g). In a case where opposition was withdrawn by the caveator the immediate reversioner, remote reversioners were allowed to enter caveat and contest the suit (h).

287. (S. 253 B. P. 74). In every case in which there is

Power to transmit statement to District Judge in doubtful cases where no contention.

no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

(a) *Upendra v Mohri Lal*, 31 C. 745, 752.

(b) *Annamalai v Malayandi*, 29 M 426.

(c) *Fatyaz v Prag* 34 I A 102, 29 A 339.

(d) *Surendra v Kastmoni*, 1 C. L. J 49 n.

(e) *Moran v. Place*, 1896 P 214.

(f) *Phanindra v Jagendrabala*, 39 C. L. J 569.

(g) *Kunja v Kailash*, 14 C. W. N. 1068.

(h) *Salindra v Sarala*, 27 C. L. J 320; 45 I C. 59.

The section. The section was added by Act VI of 1881 S. 7, to the Succession Act of 1865. Compare Court of Probate Act, 1857 (20 & 21 Vict. c. 77 S. 50).

288. (S. 253 C & D P 75.) In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents which may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorised to do; and, in that case, the same shall be sent by him to the District Judge.

The section. The section was added by Act VI of 1881 S. 7 to the Succession Act of 1865.

289. (S. 254 P. 76.) When it appears to the District Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI.

Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in his Court.

Grant of probate to be under seal of Court.

1. Change. The words 'in the form set forth in Schedule VI' have been substituted for the words 'in the manner following:—(here was set out the form now given in Schedule VI).

2. The section. The section corresponds to S. 254 of the Act of 1865 as amended by Ss. 4, 8 & 9 of Act VI of 1881 and S. 12 of Act. VI of 1889.

3. Shall grant. The terms of the section are imperative. Where the genuineness of a will is not disputed and the executor named by the testator is not legally incapable, *e.g.* is not a minor or of unsound mind, the Court has no discretion in the matter of the grant to him as it has in the case of letters of administration (a). The fact that an executor took possession of the properties of the testator before taking probate and insisted on remaining in possession is not a ground for not allowing him to act as executor after he has been taken out probate (b).

4. Probate duty. Whether the duty is payable at the time of application for probate or letters of administration has given rise to divergent rulings. In *re Aradhoney* (c) it was held that it could be paid before the grant and not necessarily at the time of the application, *per contra* in *re Omda* (d). Probate duty

(a) *Hara v. Doorgamoni*, 21 C. 195; *Idid. in Pran v. Sada*, 20 A. 189; *Thoppai v. Goindarayaller*, 94 I. C. 73.

(b) *Baldvanath v. Rajendra*, 52 C. L.

(c) J. 66, 129 I. C. 879.
5 C. W. N. 447; see *Swarnamoyee v. S. of S. for India*, 20 C. W. N. 472.

(d) 26 C. 407, 3 C. W. N. 392.

is payable only on assets which at the date of the testator's death are in British India (a). It is payable on the net value of the estate left by the deceased after deducting from the gross value (1) the debts (b), (2) the funeral expenses, and (3) the amount of mortgage encumbrances (c). The amount of the fee is to be determined by reference to the point of time when the grant of probate is made (d).

When the property left by the deceased has not been reduced to possession but consists of a right of action which the executor seeks to enforce, it is permissible to declare the value of the right to be below Rs 1,000 (e). Where at the time of the first grant of probate, duty has not been paid, it is payable at the time of the second grant (f).

As regards debts, no reduction of probate duty can be claimed on the ground that the monies lent by the deceased which are outstanding are irrecoverable or their recovery is uncertain (g). Where litigation is actually pending for the recovery of such debts, there the rule laid down in *re Abdool* (h) will apply. Where property is held on trust *eg*, on behalf of coparceners of a joint family it is not liable to payment of duty (i). This exemption is not conditional on the payment of Court fee on a previous grant but has reference to the character of the property (j). But where an undivided coparcener has power to mortgage or alienate his undivided share he owns his share beneficially and therefore duty is payable upon it (k).

The value of an annuity for the purpose of determining the amount of probate fees is to be taken to be the market value of the annuity (l). When an annuity for life is payable out of the property disposed of by a testator in his will, *ad valorem* duty is payable on the value of the property less the capitalised value of the annuity (m). In estimating the amount of *ad valorem* fee chargeable under the Court Fees Act of 1870 the amount must be paid in respect of the property without deducting the amount of the debts paid out of it. The *ad valorem* duty should be charged on the value of the property and not on the income of it (n).

Where a person having a life interest in a fund with a general and absolute power of appointment exercises such power by will no *ad valorem* fee is payable

- (a) *Re Ezekiel*, 21 B 139 (See cases cited)
 (b) *Re Kerr*, 18 C L J 308, 18 C W N 121
 (c) *Re Ram Chandra*, 1 B 118, *Re Innes* 8 B L R appdx 43, 16 W. R 253
 (d) *Swamamoyee v S of S for India*, 20 C. W. N. 472.
 (e) *Re Abdool*, 23 C. 577, *Saldanha v S. of S for India*, 24 M 241.
 (f) *Re Gasper*, 2 C. L. R. 436
 (g) *Re Ram Chunder*, 24 C 567, *Re Beake*, 13 B L. R. appdx 24 fold.

- (h) 23 C. 577 See above
 (i) *Re Pakhumall*, 23 C 930, 1 C W N 31
 (j) *Collector &c v Chunilal* 23 B 161, 6 Bom L R. 652, *Collector &c v Sacchand*, 27 B 140 4 Bom L R. 974 disappd
 (k) *Re Desa*, 33 M 93, 19 M L. J 591, *Re Bindabun*, 11 B L R. appdx. 39, *Re Froeschman*, 20 C 575 relied on
 (l) *Re Ram Chandra*, 1 B 118
 (m) *Re Rushton* 3 C. 736.
 (n) *Re Ram Chunder* 18 W. R 153

in respect of such fund under the Court Fees Act (a) Where a testator governed by the Mitakshara law out of the income of ancestral property bought some lands and by his will gave them to trustees as tenants in common, held, they held the property as trustees for the benefit of all the coparceners and consequently the property was not liable to pay duty (b)

5. Where assets do not exceed Rs. 1000 Under the Court Fees Act (VII of 1870 Sched I No 11) no duty is payable on the value of property if it does not exceed Rs 1000 This has been construed to mean that when the gross value of property exceeds Rs 1000, but the net value after deducting the liabilities is Rs. 1000 or less, the property is not exempt from liability to pay Court Fees (c). But this construction has been doubted (d)

6 Where there are assets in foreign countries. The test of liability to duty is the locality of the assets not at the time of the grant but at the time of the testator's death and, on the principle established by English decisions, the practice in cases where a testator leaves property both in British India and in England is declared to have always been to levy probate duty here upon the Indian assets (e) In *re Sassoon* (f) it was held no probate duty was payable on the value of the share of the deceased as a partner of a firm situate at Bombay, in as much as the Bombay business was not a distinct business from that in London where the head office was situate and where probate of the will of the deceased was obtained

290 (S 255. P. 77.) When it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII.

Change The words 'in the form set forth in Schedule VII' have been substituted for the words 'in manner following —' (here was set out the form now set forth in Schedule VII)

The section. The section as amended by S 13 of Act VI of 1889 corresponds to S 255 of the Succession Act of 1865 as altered by Ss 8 & 9 of Act VI of 1881 and by Act VI of 1889 S 5 (g) Where a will appoints no executor, then letters of administration, and not probate, with the will annexed are to be granted (h)

- (a) *Re Oram* 12 B L R. appdx 21, 21 W R 245, *Re George* 6 B L R appdx 138, 15 W R. 457
 In Property over which a man has power of appointment is not his own in any proper sense
Commissioner of Stamp Duties v Stephen 1904 A C. 137, 140
 (b) *Re Pokhramall*, 23 C 987, 1 C. W. N. 131
 (c) *Collector &c. v Nirode*, 17 C. W. N 21

- (d) *Re Kerr* 18 C. L. J 308, 18 C. W. N 121
 (e) *Re Ezekiel* 21 B 139, 149 31 (see English cases referred to); *Re Murch*, 4 C. 725 commented on. *Suddeley v Pitt Genl.* 1897 A C. 11, *Re Gladstone*, 1 C 168.
 (f) 21 B 673
 (g) M 780
 (h) *Ram Singh v Mutibai* 68 1 C 940

Credits 'The word, 'credits', means the effect of a transaction which may in all probability terminate in a debt or which has a direct tendency to produce a sum, due from one person to another, that is, a debt payable at a future day" (a).

291. (S. 256. P. 78) (1) Every person to whom any Administration grant of letters of administration, other than bond a grant under section 241, is committed, shall give a bond to the District Judge with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person—

(a) the exception made by sub-section (1) in respect of a grant under section 241 shall not operate ;

(b) the District Judge may demand a like bond from any person to whom probate is granted.

1. Change. See 'The section , below.

2 The section The section corresponds to S 256 of the Succession Act which in its turn was based on S 81 of the Court of Probate Act, 20 & 21 V c. 77. The section of the old Act was twice amended, first, by Act VI of 1889 S 6 which inserted the words 'letters of' after the words 'grant of' and before the word 'administration' and substituted the word 'is' for the words 'shall be' before the word 'committed' The effect of this amendment was that whereas formerly executors as well as administrators were liable under S 256 of the Succession Act of 1865 to give a bond (b), after the amendment only administrators were so liable Then came the amendment by Act V of 1902 S 9 which inserted the words 'other than a grant under S. 212 (now S 241) These words exempted attorneys or agents of absent executors from giving security In the corresponding section of the Probate and Administration Act (S 78), however, it was provided that "Every person to whom any grant of letters of administration is committed and, if the Judge so direct, any person to whom probate is granted," etc So according to that section the Judge is bound to take a bond in the case of administrators but has a discretion in the case of executors (c) and the amendments made in the Succession Act did not apply to the Probate and Administration Act The reason given for this difference in the law was thus stated —"The Indian Succession Act, following the English law, provides for the taking of security from an administrator only and it can be dispensed with in case of an executor who is selected by the

(a) M 780
(b) *Re Jogodishwari*, 7 C. 84.

(c) *Surendra v. Amrita*, 29 C. L. 496, 47 C. 115.

testator himself But amongst the classes to which the Probate and Administration Act applies cases will occasionally occur in which it may be expedient to take security even from an executor (Statement of Objects and Reasons Probate and Administration Act)

Sub section (2) is new and has been introduced to give effect to the provision of S 78 of the Probate and Administration Act in so far as that differed from the provision of S 265 of the Act of 1865 which is introduced in sub sec (1) In the case of probate a bond can only be demanded from the special classes to whom Act V of 1881 applied Report of Joint Committee The second sub section embodies the different rules provided by S 78 of the Act of 1881 —Notes on Clauses

3 Administration bond In case of a grant of letters of administration sub sec (1) requires a bond to be given in all cases (a) and the Court has no power to dispense with the bond, even in case of a limited grant (b) Under the testamentary and intestate rules of the Calcutta High Court every person to whom a grant of letters of administration other than a grant under S 241 of the Succession Act is committed is required to give a bond to and in the name of the Chief Justice with one or more sufficient sureties to be approved by the Registrar (c) The liability under an administration bond is confined to acts done as administrator and does not extend to acts done as heir under Hindu law after administration is over (d) The security is taken for the due collection of getting in and administering the estate of the deceased and to guard against malpractices (e)

The Administration of Justice Act 1925 [15 & 16 Geo V c 28 S 24 (1)] provides that every person to whom a grant of administration is made shall give a bond to the senior Registrar of the Probate Division

An administrator with the will annexed must also execute a bond for the faithful discharge of his duties (f)

4 Liability of sureties The object of demanding security is to prevent the evil consequence of malfeasance or misfeasance by an administrator and to protect the interests of the persons really entitled to the assets of the deceased The Court also contemplates the chances of the grant being subsequently declared void or voidable Accordingly it has been held that the liabilities of sureties do not depend on the validity or invalidity of a grant Even where the grant of letters is void *ab initio* because of the existence of a will the sureties remain liable for the acts of the administrator appointed and the surety bond can not be impeached on the ground of mutual mistake under S 20 of the Contract Act Therefore so long as the letters of administration remain unrevoked the grantee is to all intents and purposes an administrator and for his acts and defaults the sureties are liable (g) Similarly it has been held that an administration bond is not invalidated under S 20 of the Contract Act by reason of mutual mistake or misrepresentation

- (a) *Re Gubbay* 26 C. 408 3 C W N 364 The Administrator General and the Official Trustee can not be required to execute a bond or furnish security Act III of 1913 S 29(1) Act II of 1913 S 13(1)
- (b) *Re Fuzis* 34 L. J. P. 55 See Forms 6, 7, 8 and 9

- (d) *Ramanatham v Ragammal* 27 I C 849 17 M. L. T. 61
- (e) *Alakamaya v Gangamoyl* 1 C L. J. 120
- (f) *Tr. & C* 106
- (g) *Debendra v Adm. Genl* 33 C. 713 10 C W N 673 on 417 33 I A 109 35 C. 955

by an administrator to the sureties, or in procuring the grant (a). A surety is not bound by proceedings taken in his absence for the ascertainment of the amounts due from the administrators (b). In case of a breach of condition of an administration bond the whole amount named in the bond is not recoverable under S 74, Exception, but only reasonable compensation not exceeding the amount named in the bond (c).

The question has arisen whether a surety can have his guarantee revoked. The Calcutta High Court has given the answer in the affirmative (d). A contrary view has been taken by the other High Courts which have held that S. 130 of the Contract Act has no application in the case of a surety bond, because there is no provision in this Act enabling a surety to apply for his discharge. It has been also pointed out that the making of such an order might defeat the object for which an administrator is required to furnish securities (e). In fact the Madras High Court has gone so far as to hold that even after administration is complete a surety cannot apply to have the bond vacated (f). In England also it has been held that the Court will not discharge the original sureties to the bond and allow new sureties to be substituted in their place (g). Section 130 of the Contract Act has been held not applicable to the case of surety for the guardian of a minor's estate appointed under the Minor's Act (XX of 1864), therefore such a surety cannot ask to be relieved against misconduct or mismanagement on the part of the guardian. Query, whether the surety may not apply to the court for his protection against the guardian (h).

Under this section the District Judge can take a second bond with fresh sureties if the occasion arises, *eg*, where there is maladministration of the estate (i), or where the original sureties become embarrassed in their circumstances and if the additional security demanded be not furnished there arises just cause for revocation of the probate (j). So also the amount of the original bond may be reduced (k). No appeal lies from an order made by the District Judge on the ground that the security furnished is insufficient (l).

5 Sureties to the bond. In England it is left to the discretion of the Court to have sureties to the bonds, but they are, as a rule, always demanded, except in certain well recognised cases and two sureties are required except when the administrator is the husband of the intestate or his representative or the estate is worth less than £50 when one surety is required (m). A surety

(a) *Sarat v Rajoni*, 12 C W N 1334.

(b) *Hamadance v Ma Shure* 93 I C 459.

(c) *Chandia Mohan v Rohini*, 64 I C 366.

(d) *Raj Narain v Phulkumar*, 29 C 63, 6 C W N, 7.

(e) *Sarkya v Rogammall* 29 M 161; *Re Stark*, 1 P & D 76 fold; *Kandhu v Manki* 31 A 56, 1 I C 143, *Bai Sami v Chokshi*, 19 B 245.

(f) *Re Knight*, 33 M 373; see *Sahabuddin v Fazl Din*, 52 P R. 1912.

see cases cited in *Radhika v Rati Kanta*, 76 I C. 1009.

(g) *Re Stark*, 35 L J P. 42.

(h) *Bai Sami v Chokshi*, 19 B 245, see *Surendra v Amrita*, 47 C 115, 23 C W N 763.

(i) *Raj Narain v Phulkumar*, 29 C 63, 6 C W N 7.

(j) *Surendra v Amrita*, 47 C 115, 23 C W N 763.

(k) *Re Gould*, 34 L J P 105.

(l) *Lucas v. Lucas*, 20 C 245.

(m) Probate Act S 81; 15 & 16 Geo. V, c 49 S. 167; H XIV 20^a.

testator himself But amongst the classes to which the Probate and Administration Act applies cases will occasionally occur in which it may be expedient to take security even from an executor' (Statement of Objects and Reasons, *Probate and Administration Act*)

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(e) *Mahamaya v Gangamoyl* 1 C L. J. 120

(f) *Ti & C* 106

(g) *Dakendra v Jm Gent* 33 C. 713 10 C W. N. 673, on 21-35 1 A 109, 35 C 755

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5 Sureties to the bond In England it is left to the discretion of the Court to have sureties to the bonds but they are as a rule always demanded except in certain well recognised cases and two sureties are required except when the administrator is the husband of the intestate or his representative or the estate is worth less than £50 when one surety is required (m) A surety

(a) *Sarat v Rajon* 12 C W N 1133 v

(b) *Hamadanee v Ma Shwe* 98 I C 459

(c) *Chand a Mohan v Roh ni* 64 I C 366

(d) *Raj Natan v Phulkumari* 29 C 68 6 C W N 7

(e) *Subroya v Ragammall* 28 M 161
Re Stark 1 P & D 76 fold
Kandhya v Atanki 31 A 56
1 I C 143 *Bai Som v Choksh*
19 B 245

(f) *Re Knight* 33 M 373 see *Sahabuddin v Fazl Dn* 52 P R 1902

see cases cited in *Radh ka v Rat Kanta* 76 I C 1009

(g) *Re Stark* 35 L J P 42

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23 C W N 763

(k) *Re Gould* 34 L J P 105

(l) *Lucas v Lucas* 20 C 245

(m) Probate Act S 81 15 &
V c 49 S 167 H xiv

may be called upon to justify, i.e., to make an affidavit that he is solvent to the extent of the penalty of the bond (a) See the testamentary rules of the High Courts

There is no provision in the Act as to what is to be done or what the Court can do in the event of the death of the surety or in the event of the surety desiring to be relieved of his burden This section ought not to be read as meaning that the District Judge can once and once only direct a bond with sureties to be given and that after that has been done he becomes then and there *functus officio*, and that he has no power to call upon the administrator to furnish another surety if the circumstances so demand it (b) Sureties may be indemnified by the next of kin (c).

The bond should be given to the Judge of the District Court. In the case of the High Court the practice is to take administration bonds in the name of the Chief Justice and it can be assigned under the next section by the Registrar (d) In Madras the bond is taken in the name of the Registrar S 145 C P.O is not applicable against sureties under an administration bond (e). The Administrator General is exempted from giving a bond (Act III of 1913 S 29)

Where an order requiring an administrator to furnish security is independent of the order for grant of letters of administration, failure to give security is not a just cause for revocation of the grant (f).

6 Executor. When granting probate an executor may be called upon under sub sec (2) to furnish security for the due fulfilment of his office, but no order to that effect can be made by the District Judge once probate has been granted (g) The Judge in calling upon an executor to execute a bond ought to exercise a reasonable discretion in prescribing the sum for which the bond should be given and this question should be regulated by circumstances (h)

The discretion given to the Judge by cl (b), where it applies, to require security from an executor, is to be exercised only to guard against malpractices and therefore may be of a smaller amount than that taken from an administrator Thus security has been demanded from a widow who was young and whose affairs were managed by an agent (i). The uniform practice of the High Court of Calcutta has been not to take security from an executor named in the will (j)

- (a) H 114 209 (cases where justifying sureties are wanted)
 (b) *Bhagwan v Banka* 66 I. C. 367, *Raj Narain v Ful Kumari* 29 C. 68, 6 C. W. N. 7, *Surendra v Amrita* 47 C 115, 23 C. W. N. 763 *reled on*, *Subrota v Ragammall* 28 M 161, 14 M L J 482; *Kandhya v Alanki*, 31 A 56, 1 C 143 *dissd from*
 (c) *John v Bradbury* 1 P & D 245 *see H 114 207 for the conditions of a bond*
 (d) *Delandia v Aln. Grd.* 33 C. 713 10 C. W. N. 673 35 C.

- 955 P C
 (e) *Ko Maung v Daw Top*, 6 Rang 474 112 I C 427
 (f) *Parball v Premukh* 86 I C 563, *Surendra v Amrita* 47 C 115 *dissd*
 (g) *Glibala v Bijoy* 31 C 688, 8 C W N 665 *commented in Surendra v Amrita* 47 C 115
 (h) *Re Jaggoduhari* 7 C 84; *Munmahini v Saramoni* 125 I C 97
 (i) *Mohamaya v Gangamyl*, 1 C L J 180.
 (j) *Ran v Ralrup* 4 C L R 474, *comment in Re Jaggoduhari* 7 C 84

7. Limitation The period of limitation for a suit against a surety on an administration bond runs from the time when the Court ascertains and declares the amount to be accounted for and not from the date of the alleged misappropriation (a)

292. (S. 257. P. 79.) The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof

1 The section. The section is based on 20 & 21 Vict c 77, ss 80, 81 and 83 which with s 25 of 20 & 21 Vict c 95 regulate the procedure of the Probate Court in England in such matters. The section provides expressly for the procedure to be adopted in enforcing an administration bond. S 145 C P C is not applicable against sureties under an administration bond (b)

2. On being satisfied In assigning a bond the Court ought to exercise its discretion by seeing that the application is *bona fide*, that a *prima facie* case is made out, and that the applicant is the proper person to whom the bond should be assigned (c). The court may refuse to assign when the application is made on frivolous grounds (d)

3 Engagement has not been kept A breach takes place when an administrator appropriates any part of the estate to his own use so that it is lost to the estate (e), or fails to make provision for a legacy payable in future (f), or fails to exhibit an inventory (g), or fails to make a just and true account, but not when there is mere delay in exhibiting an inventory (h). The plaintiff may shew other breaches than those alleged by him in his application (i)

4 Upon such terms The District Judge can assign a bond on conditions but there is no provision in the law which authorises him to assign it again while the first assignment is still subsisting because it is no longer his to assign (j). Where

(a) *Hamadane v Ma Shwe*, 4 Rang 358 93 I C 459

(b) *Lo Maung v Daw Top* 6 Rang 474 112 I C 427

(c) *Re Young* 1 P & D 186 A' Sew v Aja Awan, 21 I C 297

(d) *Baker v Brooks*, 3 Sw & Tr 32, see *Re Sanders* 6 N W P H C R 62

(e) *Archbishop of Canterbury v Robertson*,

1 Cr & M 151, (1777)

(f) *Duff v Bon* (1872) 2 Q B 297

(g) *Lockman v Chater* 10 A 291; *Chandre v Rajnd* 64 I C 372

(h) *Lockman v Chater* 10 A 291

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(j) *Rajnd v Rajnd*, 64 I C 372

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two bonds had been given, the Court refused to grant leave to sue upon the first bond until the disposal of the action on the second bond (a) Before assignment notice should be given to the administrator and his sureties (b).

5. Court may assign. The District Judge is competent to assign the bond under this section (c). The Judge must assign the bond if he is satisfied as stated above Without assignment no suit would lie at the instance of a third party (d) A personal decree against an administrator cannot be executed against his surety summarily under S 145 O P. O. (e) An application is to be made asking for assignment. The assignment may be made in favour of the Administrator General (f) The practice of the Probate Court in England is that application is to be made to the Registrar for assignment of the bond and the matter is also dealt with by him (g)

6 Entitled to sue. The only person entitled to sue is the District Judge in whose favour the bond is originally given under the last section or the assignee from him under this section (h) The assignee can not sue merely to recover the loss which he has sustained by maladministration but must sue in a representative character as the trustee for all persons interested (i)

7. Proper person A creditor of the estate is a proper person to apply for the assignment (j), but not a creditor who can otherwise recover his debt from the estate (k).

8 The full amount recoverable "It is the debt and not damages which only the creditor can obtain whether *de bonis testatoris* or *de bonis propriis* (l). Therefore on a breach of condition of a bond the whole amount of the bond does not become payable under Exception to S 74 of the Contract Act but only the actual amount of damages can be recovered (m) The ground of misrepresentation by the Court or of mutual mistake by the Court and the surety is no defence to an action (n)

9 Appeal. No appeal lies against an order for assignment under this section (o)

- (a) *Re Icing* 1 P & D 658
 (b) *Haker v Brooks* 3 Sw & Tr 32
 (c) *Amarnath v Thakur*, 5 A 249, 3 A W N 12.
 (d) *Mi Sam v Nga Nyan* 21 I C 297
 (e) *Ko Maung v. Daw Tok*, 6 Rang 474
 (f) *Dehendra v Adm. Genl* 33 C 713 35 C 955 35 I A 109
 (g) *Cope v. Bennett* (1911) 2 Ch 443.
 (h) *Amarnath v Thakur* 5 A 249.
 (i) *Lachman v Chater* 10 A 29
 (j) *Mi Sam v Nga Nyan* 21 I C 297, see also *Cope v. Bennett*

- (1911) 2 Ch 488
 (k) *Lachman v Chater*, 10 A 29
 (l) *Re Saunders* 6 N W P H C R 62
 (m) *Cussetee v Dajabhat* 19 M 425 citing W Pitt V. Book II Ch. I
 (n) *Lachman v Chater* 10 A 29
Chandra v Rohini 64 I C 366.
 (o) *Sarat v Rajani* 12 C. W. N 481. *Dehendra v Adm. Genl* 33 C 713, 35 C 955 P C.
 (p) *Kalmuddin v Afshari* 31 C. 513 not foll. in *Hall v. Tin* 2 Rang 117, 20 I C 74, see *U P v. Mf B* 118 I C 431

10. Limitation The bond is subject to Sched 1 Art 68 of the Limitation Act (IX of 1908) and a suit to enforce the liability of a surety under an administration bond is barred if not brought within 3 years of the breach of condition (a).

11. Procedure. The procedure to be adopted in enforcing an administration bond is that laid down in this section and not S. 145 of the Civil Procedure Code (b).

293. (S 258. P. 80.) No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days from the day of the testator or intestate's death.

Time for grant of probate and administration.

The section The section has been read as if there was a comma after the words "fourteen clear days" and there was the word 'respectively at the end of section. The words "letters of administration" do not include letters of administration with the will annexed which may therefore be granted after the expiration of 7 clear days from the testator's death. The distinction intended by the legislature is that "where a will is proved the grant may be made after the lapse of seven clear days, but where there is no will, not until after the expiration of fourteen clear days" (c)

Clear days. The day of the testator's death is to be excluded in computing the period

294. (S. 259. P. 81). (1) Every District Judge, or District Delegate, shall file and preserve all original wills, of which probate or letters of administration with the will annexed may be granted by him, among the records of his Court, until some public registry for wills is established.

Filing of original wills of which probate or administration with will annexed granted.

(2) The Local Government shall make regulations for the preservation and inspection of the wills so filed

Change. The words "or District Delegate" were added to S. 259 of the Act of 1865 by Act VI of 1881 S 9

Public Registry This section contemplates the establishment of a Public Registry for wills (cf Probate Act 20 & 21 Vict. c. 77. S 66) and power is conferred on the Local Government to frame regulations in connection therewith. No special public registry has been set up as yet. There is a saving clause in the Registration Act XVI of 1908 S 46 in reference to this section.

295. (S. 261. P. 83). In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be,

Procedure in contentious cases

the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

1. **Change.** The words 'regular' and '1908' have been added in this section and the words 'has appeared' substituted for the words 'may have appeared'

2. **The section** It prescribes the procedure to be adopted in contentious cases. It does not lay down that such proceedings shall become a suit (a). The grounds of objection should be in the form of a pleading and properly verified in accordance with the provisions of O VI, r. 5 C. P. C. Similarly the reply should be properly verified, and the proceedings should then take the form of a suit (b). Full pleader's fee as of a suit is allowed in such proceedings (c).

3. **Contention.** It has been already observed that a petition for probate becomes contentious not on the entry of a caveat, but on the filing, within 8 days of such entry, of an affidavit in support of the caveat. If subsequent to the filing of the affidavit the defendant does not appear in support of the caveat the petition should not be allowed to be disposed of by the registrar as a non contentious matter but the caveat should be dismissed and order made for a grant if the papers be in order (d). Until the opposition is entered, therefore, the application for probate does not become contentious (e). A petition for grant of probate is not a suit in the ordinary acceptation of the term, but is a miscellaneous civil proceeding, and, under S 141. C. P. C., the procedure in regard to suits shall be followed as far as it can be made applicable (f). It is only when contention arises that proceedings in connection with probate or letters of administration can take the form of suits, and therefore if an application for probate be withdrawn before proceedings have become contentious, O 23, r. 4 C. P. C. does not apply or bar a fresh application (g). A proceeding which is contentious in its origin does not cease to be so by the withdrawal of the pleader from the proceeding (h). Where there are two wills, there should be two caveats and two suits which are to be heard together (i).

4. **As nearly as may be** It should be noted that proceedings under this Act is not a suit, properly so called, but under this section takes the form of a suit according to the provisions of the C. P. C. (j). In other words, probate proceedings do not, under the ordinary law, fall within the description of 'a regular

- (a) *Maung Tun v. Ma Sein*, 68 I C 671.
 (b) *U. Sine v. Maung Maung* 82 I C. 973
 (c) *Nathan v. Nathan*, 123 I C 220, *Sadha v. Gangeswar*, 57 I C. 739 (S. 152 C. P. C.).
 (d) *Chotalal v. Bal Kotalal* 22 B. 261; see *Venidas v. Bal Champalal* 31 Bom. L. R. 1014
 (e) *Sureshra v. Kaimort* 1 C. L. J. 41 Notes
 (f) *Thakur Prasad v. Fakirullah*, 22 I A. 44, 17 A. 106

- (g) *Pakiam v. Innai*, 19 M. 455; *Chotalal v. Bal Kotalal*, 22 B. 251; see *Radhashyam v. Rango*, 24 C. W. N. 541.
 (h) *Phanindra v. Nagendra*, 37 C. L. J. 369, 84 I C. 65
 (i) *Venidas v. Bal Champalal*, 31 Bom. L. R. 1014 122 I C. 126 See Bombay High Court Rules 875; *Kanholia v. Ganga* 50 A. 235; *As Maung v. Daw Top*, 6 Rang 474, 112 I C 427.

suit' but by virtue of this section are brought within that category not in point of fact but in point of form for the limited purpose of applying to them as nearly as may be the provisions of the Civil Procedure Code. Therefore there is a difference between a regular suit and a suit as contemplated by this section (a). A contentious probate proceeding under this section takes the form of a suit in which the petitioner for probate or letters of administration is the plaintiff and the person appearing who opposes the grant is the defendant (b). The words as nearly as may be imply that the provisions of the C P C are not to be strictly applied to all contentious proceedings before the District Judge. Practice of Court also to a certain extent regulates the procedure in such cases (c). The provisions of the C P C therefore are not to be strictly applied to probate proceedings but only so far as the circumstances of the case will permit (d). Thus it is not obligatory upon executors to file a list of their documentary evidence with the application for probate or subsequently to give a list of them (e). Where an application for probate was withdrawn before it became contentious the applicant was allowed to propound the same will in opposition to an application for letters of administration (f). It is not competent to the Court to allow the parties to divide the testator's property without proving the will (g). An order of a District Judge granting probate is a decree (h). As regards *ad interim* remedies there is no difference between a civil suit and a testamentary one (i). In a testamentary suit the subject matter of the suit is the property of which the executor is the legal owner under the will and of which the probate declaring him to be executor recognises him before the Court as the legal owner (j). Proceedings for the grant of probate when contested come within the meaning of the word *suit* as used in the Letters Patent of the High Court and as such can be transferred to that Court (k).

5 Discretion of Court. A proceeding under this section not being a regular suit Judges have exercised a certain discretion in applying the provisions of the C P C (l). This discretion conferred by the section has to be exercised with care *e.g.* on a caveator refusing to answer a question the Judge can not dispense with proof of the will under O 16 r 20 C P C and grant probate (m).

6 Revocation of Probate. A proceeding initiated for revocation of probate, it has been observed cannot be regarded as a civil suit but is a miscellaneous proceeding and therefore this section has no application (n). But

- (a) *Sundrabai v Collector &c* 33 B 256 2 I C 283 see *Ko Maung v Daw Tok* 6 Rang 474
 (b) *Kalyanchand v Sitabai* 38 B 309 330 23 I C 325 *Re Damubai* 18 B 237
 (c) *Chotalal v Bai Kabubai* 22 B 261 264 As to the meanings of the words plaintiffs defendants interveners see Tt & C 434
 (d) *Ganshamdoss v Saraswathi* 87 I C 621 see *Amcer v Mohanund* 6 C. L. J 453 *Saroda v Gobindo* 12 C. L. J 91
 (e) *Surendra v Kasumoni* 1 C. L. J 49 N

- (f) *Paklam v Innasi* 19 M 458
 (g) *Janakbali v Gajanand* 20 C W N 986 37 I C 12
 (h) *Umrao v Bindaban* 17 A 475
 (i) *Yeshawant v Shankar* 17 B 388 391
 (j) *Re Damubai* 18 B 237 240
 (k) *Pran Kumar v Darpahari* 54 C. 126
 (l) *Kalimuddin v Mohuni* 39 C 563
 (m) *Ravi v Vishnu* 9 B 241
 (n) *Pratap v Kali* 4 C. W N 600
Gaurabini v Pratap 4 C W N 602 *Saroda v Gobindo* 12 C L J 91

a contrary view has also been held and such a proceeding has been regarded as a suit (a). These conflicting decisions may be reconciled by the view expressed in *re Harendra* (b), where it has been observed that a proceeding should be initiated by a plaint and therefore will take the form of a suit where relief is sought on the ground that the will is invalid, but where relief is sought on the ground of some irregularity in making the grant the application will be made by motion which will be a miscellaneous proceeding under S 141 C P C. In England revocation proceedings are regarded as actions or suits "There are three kinds of actions in the Probate Court (i) actions for proving the will in solemn form, (ii) administration actions for the determination of the right to a grant of administration by the contesting claimants, (iii) actions for revocation of probates and letters of administration" (c). The words, "In any case", seem to be comprehensive enough to include revocation proceedings.

7 Compromise When a probate is granted in common form by reason of a compromise between the parties, the terms of the compromise cannot be embodied in the order, or, as is sometimes expressed, made a rule of court, for the reason that a Court of Probate cannot in many instances enforce the term (d) but they may be enforced by an action if they are otherwise unobjectionable (e). The Probate Court is wholly powerless to enforce the compromise (f).

A compromise varying all the material provisions of a will is invalid (g), unless, as has been said, they have been varied with the consent of all the parties, in which case the agreement can be given effect to. The rights of the parties after a compromise are secured by the compromise and do not depend on the terms of the will (h). Such a compromise can not be impeached by one of the parties (i).

It may be taken as settled law that in a contentious proceeding probate may be granted in common form in consequence of a compromise between the disputants resulting in the withdrawal of opposition and that it cannot be afterwards revoked except on proof of fraud or circumvention practised either upon the Court or upon the parties (j).

The Court will refuse to record a compromise which is bad in law, e.g., an executor cannot compromise the claim of a co executor (k), parties cannot exclude

(a) *Sheik Ajim v Chandra* 8 C W. N 748

(b) 5 C W N 383, see *Re Mahendra* 5 C W N 377, *Khirodamoyl v Bagala*, 4 C. L. J 492, *Ameri v Mohanand*, 6 C L J 453, 456

(c) T & C. 419. Revocation proceedings have therefore been regarded as actions in English law

(d) *Exans v Saunders* 30 L. J P 184, *Road Night v Carter*, 3 Sw & Tr 44, *Cordill v Christian* 2 P & D 181

(e) *Kunja v Kailash*, 14 C. W. N 1065 71 C 740; see *Kamal v Narendra*, 9 C. L. J 19, 29. See *Selli v Ram Kishun*, 55 1 C

504 (where compromise is objectionable)

(f) *Sarada v Tilgana* 3 Pat L J 415.

(g) *Jamnath v Dharsey*, 4 Bom L. R 893, 903

(h) *Kamal v Narendra* 9 C. L. J 19, 29, *Harpal v Lekhra*, 30 A 406

(i) *Surja v Shyama* 14 C W. N 967

(j) *Kunja v Kailash* 14 C. W. N 1065 (See Eng cases cited)

(k) *Chidambara v Arishnaswami*, 25 M L. J 285 (the compromise was if sanctioned by court will not give it validity)

evidence in proof of the will (a), nor where probate has been revoked on the ground that the will is a forgery can they obtain a reversal of the decision and a revival of the probate without adjudication on the merits (b).

296. (S. 333. P. 157) (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

Surrender of revoked probate or letters of administration.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

The section. "This (section) reproduces S. 333 of the Act of 1865 and S 157 of the Act of 1881 which are in identical terms. These sections were added in these respective Acts by S. 17 of Act VI of 1889 and are obviously out of position in those Acts."—Notes on clauses.

Surrender of grant. Probate or letters of administration should be delivered up at the time of revocation for cancellation. "If the revocation be compulsory, i.e. by citation of the party, he will bring the grant into the registry or suffer the penalty of his contempt" (c). The penalty is mentioned in sub-sec. (2). If the party be abroad, so that the grant is not available, it will be revoked though it cannot be cancelled (d), so also if the grant be lost, but the grantee must give an undertaking to deliver it if found (e). A solicitor with a lien has been allowed to keep a revoked grant (f).

297. (S. 262. P. 84). When a grant of probate or letters of administration is revoked, all payments *bona fide* made to any executor or administrator under such grant before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration may afterwards be granted might have lawfully made.

Payment to executor or administrator before probate or administration revoked.

(a) *Monmohini v Banga*, 31 C. 357;
Sarda v Gobindo, 12 C. L. J

91.
(b) *Sarda v Gobindo*, 12 C. L. J

91.
(c) Tr. & C. 291

(d) *Baker v Russell*, 1 Lee 167,
Re Langley, 2 Rob 408

(e) *Re Carr*, 1 Sw. & Tr. 111.

(f) *Baines v. Dutham*, 1 P.
723

1 Change The words 'when a grant of probate or letters of administration is revoked' have been substituted for the words 'where any probate is, or letters of administration are revoked', the words 'has acted' for the words 'shall have acted', the words 'revoked grant' for the words 'revoked probate or administration' the words 'may afterwards' for the words 'shall be afterwards'

2 The section Compare Court of Probate Act, 1857, 20 & 21 Vict c. 77, Ss 77, 78 See S 263 note Judicial opinion has undergone a change as to the effect of revocation of probate or letters of administration upon the acts of an executor or administrator who is removed from office

3 The older view In the earliest class of cases the effect of revocation was made to depend mainly upon whether the grant was void *ab initio* or merely voidable An act of necessity, e.g. alienation of a part of the estate to meet the funeral expenses of the testator or debts which the executor or administrator was compellable to pay, was valid and binding on the estate (a), but if the act in question was a voluntary one, no title passed to the purchaser (b)

4 The modern view The modern view is that so long as the letters of administration remain unrevoked, the grantee is to all intents and purposes an administrator and his receipts are valid discharges for all moneys received by him as administrator (c) It should be noted that this principle was laid down by the Privy Council in a case where letters of administration had been obtained by fraud and suppression of the fact that the deceased had left a will (d) In England also in a case where letters of administration were taken out by suppressing a will the Court held that the grant was voidable A grant made by a competent Court, though erroneously, is voidable, i.e., is operative till it is revoked by that Court or set aside by a superior tribunal, therefore the acts of the administrator are binding upon the estate (e), and the proceedings in a suit prosecuted on behalf of the estate by an executor whose appointment is subsequently revoked, are binding on the estate (f) The law is fully discussed in the case of *Sailaja v Ja Lu* (g)

298. (P. 85.) Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Muhammadan, Buddhist or exempted person, or a Hindu, Sikh or Jaina to whom section 57 does not apply, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

- (a) *Peckham's Case* Plowd 282.
Graysbrook v Lee, Plowd 275
 (b) *Henson v Steller* (1913) W N 246, (1914) 2 Ch 13 *Ellis v Ellis* (1925) 1 Ch 613
 (c) *De la Cruz v Allen* 33 C 713 10 C W N 673 on app 35 I A 107 35 C 935 See *Gerard v Hatherly* 33 C 657 *Allen v Dunlop* 3 T R 125

- Prayag v Gokaran* 6 C. W. N 787 does not go quite so far
 (d) *Dandia v Aldm* Gerl. 35 I A 107 35 C 935
 (e) *Crafter v Thomas* (1927) 2 Cl 345
 (f) *Ma Thien v Nepean* 8 Rang 451 124 I C 357
 (g) 19 C W N 247 27 I C 715

Change. The words 'where the deceased does not apply' have been substituted for the words 'except in cases to which the Hindu Wills Act, 1870 applies'.

The section. The section formed S 85 of the Probate Administration Act. There was no corresponding section in the Succession Act of 1865. Sir Whitley Stokes remarks (a) "as it is apprehended that in some cases of family funds a person entitled to a trifling share of the deceased's estate might apply for administration merely for the purpose of harassing his co-heirs by compelling them to apply, a full discretion has been reserved to refuse, for reasons recorded, to grant any application".

No discretion in case of probate. The section enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration but no such discretion is given in regard to an application for probate by a person nominated as executor by the testator (b). Therefore, when the genuineness of a will is not disputed and the executor suffers from no legal incapacity, the Court cannot refuse an application for a grant on the ground that in its opinion the applicant is not a fit and proper person to be appointed executor (c). An application for letters of administration with the will annexed stands on the same footing as an application for probate and therefore is not governed by this section (d).

Discretion in case of administration. The section gives the Court a discretion in certain specified cases to refuse letters of administration. In a case governed by S. 57 of the Act it is not open to the Court to order summarily that no grant of letters of administration be made (e). In determining whether a grant should be made or not it is the duty of the Court to consider whether there is any estate whatever to be administered, so that where administration is complete or unnecessary the application may be refused, or where the ulterior object is to fortify the claim of the applicant to the estate in a subsequent suit (f), or where a legatee applies with the fraudulent intention of defeating the testator's intention which he undertook to carry out (g). Where the estate consists mainly of movables, letters of administration are not necessary as debts can be recovered by a succession certificate (h). As to the points to be considered before making a grant of letters of administration, see *Kali v Nriya* (i).

Hindus. The exception with regard to the Hindus, since the amendment of section 57, is confined to the exempted classes of Hindus only.

299. (S. 263. P. 86). Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the

Appeals from
orders of District
Judge

- (a) Statement of Objects and Reasons of the original Bill
- (b) *Pran v Jado*, 20 A. 189, *Hara v Doorgamoni* 21 C. 195, *Hotchand v Navalrai*, 121 I. C. 173
- (c) *Hara v Doorgamoni* 21 C. 195
- (d) *Babu v Umbe* 45 I. C. 974, 110 P. W. R. 1918
- (e) *Girja Bala v Manindra*, 31 C.

W. N. 874

- (f) *Lall v Baikuntha*, 15 C. L. J. 305, 14 C. W. N. 463, *Re Nursing* 3 C. W. N. 635 relied on
- (g) *Manuel v Jnana* 31 M. 187, 18 M. L. J. 158.
- (h) *Ma Kyin v Ma Shwe*, 36 I. C. 265
- (i) 14 C. W. N. cclii

provisions of the Code of Civil Procedure, 1908, applicable to appeals.

1. **Change.** The words 'in accordance with the provisions of' have been substituted for the words 'under the rules contained in'.

2. **Every order.** It is not every order made by a District Judge or District Delegate that is appealable to the High Court, but only orders in respect of which appeals have been provided for by the Civil Procedure Code (a) This section read with S 266 allows an appeal to the High Court in cases in which an appeal is allowable under the C P C (b) The word 'order' refers not only to orders mentioned in S 104 and O 43 r 1 but includes decrees. Thus an application for revocation must be treated as a suit and when such a suit is dismissed on the ground that the applicant has no *locus standi*, such decision amounts to a decree and therefore an appeal lies to the High Court (c), so also an order of a District Judge granting or refusing probate of a will is a decree within the meaning of S 2 (u) C P C. and is appealable (d), so also an order made by a single Judge of the High Court refusing to stay the issue of probate and the discharge of the receiver appointed in a probate action (e). It has been held that an order granting permission to an administrator to sell immovable property (f), where there is opposition, an order calling upon an executor to pay an additional probate duty (g) and an order passed by a District Judge granting remuneration for preparing a list of properties left by a deceased person (h), are appealable. An appeal lies under S 10 of the Letters Patent of the High Court at Allahabad from the judgment of a single Judge in appeal from an order of a District Judge granting probate of a will (i). An appeal lies from a decree passed by the Recorder of the Court of Rangoon, where the subject matter of the suit is above Rs 1000, not to the High Court but to the Privy Council (j).

In *Umacharan v Mukhtakeshi* (k) it was held that every order made by a District Judge or District Delegate was subject to an appeal, but exception has

(a) *Broja v Dasmony* 2 C L R 589

(b) *Ahetramoni v Shyama* 21 C 539, *Sri Prashad v Dulhin* 18 C L J 612, *Ashram v Gopal* 17 C 43, *Rangini v Dhendra* 8 C W. N 221, *Falimuddin v Mahurri* 39 C 563 16 C W N 62, *Anononjan v Bjoy* 90 I C 729, *Iolung Lakhi v Dhanada* 19 C W N 1077 15 I C 196, but see *Chheda Lal v Ram Dulak*, 127 I C 24 and *U Pa v Mf Ba* 118 I C 431 every order made by a District Judge under this Act is appealable.

(c) *Saikh Aitm v Chandra* 8 C W N 745 123 1218 *Lakhi v Mullon* 17 C L J 230 16 C W N 1077, per contra *Rasna Ramon v Gopal* 24 C W N 316

(d) *Montgomery v Garret* O me 35

A 448, *Umrao v Brindaban* 17 A 475, 15 A W N 104

(e) *Ganga v Dalp* 24 A 13, 5 C W N 781

(f) *Uma v Mukhtakeshi* 28 C 149 5 C W. N 443, *Sarat v Benode* 20 C 23, *Haji Pu v Tin Tin* 2 Rang 117

(g) *Swamamoyee v S. S. for Inds* 43 C 625 20 C W. N 472

(h) *Chhacharal v Nasir* 2 Bom L R 793

(i) *Umrao v Brindaban* 17 A 475, *Ganga v Dalp* 24 A 13 5 C W N 781

(j) *Essaf v Lalima* 24 C 33 1 C W. N 8

(k) 25 C 149 5 C W N 443, *U Pa v Mf Ba*, 118 I C 431, *Chheda Lal v Ram Dulak* 127 I C 24, *Sarat v Benode* 20 C W N 25, 33 I C 143

been taken to this view on the ground that the reference to the C. P. C. is only for the purpose of procedure regulating appeals (a) The language of the section has also been criticised (b)

3 Where appeal lies to the High Court Where a District Judge purported to act under this section but his orders were *ultra vires*, an appeal lies under this section, and even if no appeal lies, the High Court can interfere under S 115 (c) An appeal lies where the order of the District Judge or of a single Judge of a High Court amounts to a decree (d) By the Bombay Civil Court Act (XIV of 1869 as amended by Act 1 of 1900) an appeal from an order of an assistant Judge lies in a probate matter where the subject matter does not exceed Rs 5000 to the District Judge (e)

4 Where no appeal lies No appeal lies from an order deciding that the District Judge has jurisdiction to entertain an application (f), from an order of a District Judge refusing to make a person a party defendant in an application for probate (but the order is subject to revision under S 115 C P C) (g), from an order declaring that a person has a *locus standi* (but the High Court can interfere in revision) (h), from an order directing an executor to furnish security (i), from an order refusing to amend a clerical error in probate granted by a predecessor of the District Judge (j), from an order made by the District Judge as to the amount of (k) or asking for security (l), from an order of a District Judge wrongly assigning an administration bond already assigned to another person (m), from an order admitting a review of judgment (n) from an order by a District Judge setting aside an application for grant of letters of administration because it is not an order passed under the Act (o)

5 Hereby The word hereby means by the whole Act and not merely by the chapter in which the word occurs (p)

6 Revision. Where no appeal lies, the High Court may interfere in revision under S. 115 of the C. P. C. (q).

- (a) *Haji Pu v Tin Tin*, 2 Rang 117
 (b) *Sarat v Benode* 20 C. W N 28
 (c) *Narayan v Soudamini* 11 C. W N 221
 (d) See above
 (e) *Laxmi v Aba* 32 B 634
 (f) *Shib Di v Devindar* 71 C. 710
 (g) *Ahetramoni v Shyama* 21 C. 539, *Sri Prasad v Dulhin*, 18 C. L. J 612, 22 I C 276, *Indubala v Panchamani*, 19 C. W N 1169
 (h) *Radharaman v Gopal* 24 C. W N 316, *Lakhi v Mullan*, 16 C. W. N 1099 15 I C 656, though it was appealable under S 393 (2) of the Code of 1852, *Ahiram v Gopal*, 17 C. 45
 (i) *Rangini v Dehdas* 8 C. W N 221
 (j) *Gerindra v Rajaman*, 27 C. 5

- (k) *Lucas v Lucas* 20 C. 245
 (l) *Monmohini v Taramani*, 125 I C 99
 (m) *Kalmuddin v Mahumai*, 39 C 563 16 C. W N 662 (but the High Court can interfere in revision)
 (n) *Ahram v Gopal*, 17 C. 45, *foliaz Brojonath v Dasmoni* 2 C. L. R. 559
 (o) *Agre v Ma Pu*, 20 I C. 281
 (p) *Uma v Mukhtakeshi*, 28 C. 149, 5 C. W N 443
 (q) *Kalmuddin v Mahumai* 39 C. 563 16 C. W N 662, *Gerindra v Rajeswari* 27 C. 5, *Ahetramoni v Shyama*, 21 C. 539, *Sri Prasad v Dulhin*, 18 C. L. J 612, 22 I C. 276, *Narasim v Soudamini*, 11 C. W. N 221, *Radharaman v Gopal*, 24 C. W N 316, *v Laxmi*, 125 I C. 709

7. Reference. No reference under S 113 and O. 46 r. 1 C. P. C can be made to the High Court where an appeal lies from the order, though, when referred, the High Court may deal with the matter as a Court of concurrent jurisdiction under S. 300 (a).

3. Miscellaneous The right of appeal to the High Court is a special right conferred by this section and an order passed by High Court upon an appeal made to it is final and no further appeal lies to the Privy Council (b). An appeal has been dismissed because a copy of the decree was not attached to the memorandum of appeal (c).

300. (S. 264. P. 87). (1) The High Court shall have ^{Concurrent} concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay, and the province of Burma, shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the Local Government has, by a notification in the local official Gazette, authorized it so to do.

High Court. The jurisdiction conferred on the High Court by this section is not intended merely to be confined to the High Court in its appellate jurisdiction but is exercisable by the High Court in its original jurisdiction. The definition given in the General Clauses Act, 1893, the highest court of appeal does not apply to this section (d). The word 'concurrent' would become meaningless if the jurisdiction was confined to the High Court in its appellate side only. Therefore the original side of the High Court has jurisdiction in any case which could have been brought in any of the two provinces of Bengal and it is not necessary that any portion of the property of the deceased shall be within the limits of its original jurisdiction (e).

The High Court can exercise concurrent jurisdiction with the District Judge in the exercise of all the powers granted under this Act even where the application is not originally made to the High Court but comes before it on a reference erroneously made by a District Judge (f).

Sub sec (2). It embodies the provision in that behalf in S 2 of Act V of 1891. Notes on Clauses See S 264

(a) *Re Menahur*, 5 C 756
 (b) *Isa Khan v. Isa Sein*, 51 1 C 571
 (c) *Hem v. Jalal*, 15 C. L. J 116
 17 1 C 57

(d) *Re Mohendra*, 5 C W. N 327
 (e) *Nagendra v. Kathipal*, 37 C. 224.
 5 1 C 1003
 (f) *Re Menahur*, 5 C. 756

301. (S. 264 A. P. 87 A). The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

The section. The section was introduced in the Succession and the Probate and Administration Acts as Ss. 264 A and 87 A respectively by Act XVIII of 1919. This section empowers the High Court in a fit case to suspend, remove, or discharge a private executor or administrator. Previous to the introduction of this section the Court exercised the power under the Administrator & Official Trustees Act [V of 1902 s 4 (2)] which repealed and re enacted Act II of 1874 S 31 Under the Administrator General's Act (III of 1913 S 25) any private executor or administrator may, with the previous consent of the Administrator General, transfer the assets to him (a).

The section enacts S 4 of the Administrator General's Act (V of 1902) That Act itself reproduces the provisions of the Judicial Trustees' Act of England, 59 & 60 Vict c 35. Before the passing of these Acts the Courts had really no power to remove an executor, as distinguished from a trustee, though he could be restrained from acting by the appointment of a receiver On an application under this section being made, the Court ought to enquire into the allegations made and not dismiss it without any kind of enquiry No suit lies for this purpose (b).

Power of Court. Whether the Court will exercise the power or not must depend on the merits of each case. The effect of an order for removal or suspension under this section is that the executor or administrator will be discharged in regard to future liability and future acts without in the least affecting his liability in regard to past transactions (c).

The court can restrain a person who has become insolvent since the testator's death from acting as executor (d) and where assets are being wasted by him can remove him and appoint a receiver (e). An application for receiver and injunction to restrain an executor or administrator from interfering further in the administration of the estate can only be justified by evidence of gross misconduct or personal disability on the part of the legal representative or of the person having the power to deal with the estate (f) It is by the appointment of a receiver that the Court of Chancery controlled a bankrupt executor (g) and the Probate Court may refuse to grant probate to an executor where equity would restrain him from acting and would appoint a receiver (h)

(a) *Adm. Genl v Premal*, 22 C. 788 P. C.

(b) *Dhanabakkiammal v Thangacelu*, 50 M 956

(c) *Re Ameerchand*, 29 B 188

(d) *Boven v Phillips*, (1897) 1 Ch 174; *Stanton v. Carron Co.*, 18

Beav 146, 161

(e) *Re Wells*, 45 Ch D 569

(f) *Brooker v Brooker*, 3 Sm & G 475, see *Hafizabai v Kazi Abdul*, 19 B 813

(g) *Re Hopkins*, 19 Ch. D. 61.

(h) *W.* 157 f n.

7. Reference. No reference under S 113 and O. 46 r. 1 C. P. C can be made to the High Court where an appeal lies from the order, though, when referred, the High Court may deal with the matter as a Court of concurrent jurisdiction under S. 300 (a).

3. Miscellaneous. The right of appeal to the High Court is a special right conferred by this section and an order passed by High Court upon an appeal made to it is final and no further appeal lies to the Privy Council (b). An appeal has been dismissed because a copy of the decree was not attached to the memorandum of appeal (c)

300. (S. 264. P. 87). (1) The High Court shall have **Concurrent jurisdiction of High Court.** concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay, and the province of Burma, shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the Local Government has, by a notification in the local official Gazette, authorized it so to do.

High Court. The jurisdiction conferred on the High Court by this section is not intended merely to be confined to the High Court in its appellate jurisdiction but is exercisable by the High Court in its original jurisdiction. The definition given in the General Clauses Act, viz, the highest court of appeal does not apply to this section (d). The word 'concurrent' would become meaningless if the jurisdiction was confined to the High Court in its appellate side only. Therefore the original side of the High Court has jurisdiction in any case which could have been brought in any of the two provinces of Bengal and it is not necessary that any portion of the property of the deceased shall be within the limits of its original jurisdiction (e)

The High Court can exercise concurrent jurisdiction with the District Judge in the exercise of all the powers granted under this Act even where the application is not originally made to the High Court but comes before it on a reference erroneously made by a District Judge (f)

Sub sec. (2) It embodies the provision in that behalf in S 2 of Act V of 1881. Notes on Clauses. See S 264

- (a) *Re Monohur*, 5 C. 756
 (b) *Po Kin v. Ma Sein*, 51 I C 590
 (c) *Hem v. Jadub*, 16 C. L. J 116, 17 I C. 99.

- (d) *Re Mohendra* 5 C W. N 377
 (e) *Nagendra v Kashipall*, 37 C. 224, 5 I C. 1003
 (f) *Re Monohur*, 5 C 756

301. (S. 264 A. P. 87 A). The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

The section. The section was introduced in the Succession and the Probate and Administration Acts as Ss. 264 A and 87 A respectively by Act XVIII of 1919. This section empowers the High Court in a fit case to suspend, remove, or discharge a private executor or administrator. Previous to the introduction of this section the Court exercised the power under the Administrator & Official Trustees Act [V of 1902 s 4 (2)] which repealed and re enacted Act II of 1874 S 31. Under the Administrator General's Act (III of 1913 S. 25) any private executor or administrator may, with the previous consent of the Administrator General, transfer the assets to him (a).

The section enacts S 4 of the Administrator General's Act (V of 1902) That Act itself reproduces the provisions of the Judicial Trustees' Act of England, 59 & 60 Vict. c 35. Before the passing of these Acts the Courts had really no power to remove an executor, as distinguished from a trustee, though he could be restrained from acting by the appointment of a receiver. On an application under this section being made, the Court ought to enquire into the allegations made and not dismiss it without any kind of enquiry. No suit lies for this purpose (b).

Power of Court. Whether the Court will exercise the power or not must depend on the merits of each case. The effect of an order for removal or suspension under this section is that the executor or administrator will be discharged in regard to future liability and future acts without in the least affecting his liability in regard to past transactions (c).

The court can restrain a person who has become insolvent since the testator's death from acting as executor (d) and where assets are being wasted by him can remove him and appoint a receiver (e). An application for receiver and injunction to restrain an executor or administrator from interfering further in the administration of the estate can only be justified by evidence of gross misconduct or personal disability on the part of the legal representative or of the person having the power to deal with the estate (f). It is by the appointment of a receiver that the Court of Chancery controlled a bankrupt executor (g) and the Probate Court may refuse to grant probate to an executor where equity would restrain him from acting and would appoint a receiver (h).

- (a) *Adm. Genl v Premal*, 22 C. 788 P C
 (b) *Dhanabakkiammal v Thangacelu*, 50 M 956
 (c) *Re Ameerchand*, 29 B 188
 (d) *Boven v Phillips*, (1897) 1 Ch 174, *Stainton v Caron Co.*, 18

- Beav* 146, 161
 (e) *Re Wells*, 45 Ch D 569
 (f) *Brooker v Brooker*, 3 Sm & G 475, see *Hafizabal v Kazi Abdul*, 19 B 813
 (g) *Re Hopkins*, 19 Ch. D. 61.
 (h) *W.* 157 f n.

The word may shows that a proper case must be made out for removal. The Court has therefore got a discretionary power but the discretion is not arbitrary but a judicial discretion. It is not open to the Court to dismiss a petition without any kind of enquiry (a)

Procedure Notice of the application for removal ought to be given to the executor or administrator sought to be removed as it is a cardinal principle of law that 'a judicial order which may possibly affect or prejudice any party cannot be made unless he had been afforded an opportunity to be heard (b) In *Jagannath v Mahesh* (c) it has been observed that in the absence of any provision on the subject the procedure to be adopted in case of removal of an executor or administrator will be similar to that followed under the Guardians and Wards Act (VIII of 1890) for the removal of a guardian

302. (S 264 B P. 87 B.) Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof

The section The section was introduced in the Succession Act and in the Probate and Administration Act as Ss 264B and 87B respectively by Act XVIII of 1919. Under the Trustees and Mortgagees Powers Act (XXVIII of 1866 S 43) a trustee executor or administrator may apply to the Court for direction or advice respecting the management or administration of the property of the deceased but not disputed points of law (d). The section gives ample power to the Court to settle questions arising between the executor and the legatees and between the legatees themselves or complicated points of law and also power to construe a will whenever the Court is asked to do so. Cf O 55 r 3 of the Rules of the Supreme Court of England (e).

High Court The directions referred to in this section can be granted only by the High Court (f). Apparently after a grant of probate or letters of administration a District Judge has no power to give such directions. Act V of 1902 S 5 (2) empowered the High Court to give directions to any private executor or administrator. This provision was repealed and transferred to the Succession Act as S 264 B and to the Probate and Administration Act as S 87 B. Under S 269

(a) *Dhanabakkiammal v Thangavelu* 50 M 956 105 I C 782

(b) *Rajendra v Alal* 25 C L J 456 *Ajan v Christen* 17 C W N 862

(c) 25 C. L. J. 149

(d) *Re Bireelon* 7 B 381 *Re Lakshimibai* 12 B 639 *Re Madras Dorelon Trust Fund* 18 M 443 (under Trusts Act II of 1882 S 34)

(e) *Vanama v Vanama* 51 M 849 55 M L J 517 but see *Pooas v Ashulosh* 56 C. 979 the Court is not competent to decide disputed questions of title but can only give directions relating to the management and administration of the estate.

(f) As to the nature of directions see *Vanama v Vanama* 51 M 849 110 I C. 186.

a District Court has power to make orders with reference to the property under certain circumstances so long as no person has been appointed administrator of the estate or granted probate of the will But that section has no application after an administrator has been constituted (a)

Originating summons. The directions may be asked on an originating summons which gives the Court jurisdiction to decide points relating to the administration of the estate or questions arising between the executor and the legatee But the Court has no jurisdiction on an originating summons to decide a question between an executor and a stranger holding money which is alleged by the executor but denied by the stranger to belong to the estate, because such a question cannot be tried in an administration suit unless the stranger consented (b) An originating summons enables a court to decide questions which may arise in the administration of the estate without the necessity of an administration by Court or an administration suit (c) Ch. XIII r 1 (e) of the rules of the High Court of Calcutta provides for an executor or administrator taking out an originating summons for the determination of questions set out in that rule (d) The object of an application on an originating summons is to obtain a decision of a single question arising in the administration of the estate where formerly an administration suit was necessary, thereby effecting a great saving of costs (e) The High Court will be very reluctant to give directions which would in any way conflict with the judgment delivered by another Court (f) A proceeding commenced by taking out an originating summons is a suit and, if the order will affect title to immovable properties lying outside the jurisdiction of the High Court, leave under Letters Patent is a condition precedent to the institution of the suit (g)

CHAPTER V.

OF EXECUTORS OF THEIR OWN WRONG.

303. (S 265). A person who intermeddles with the
 Executor of his estate of the deceased, or does any other
 own wrong. act which belongs to the office of executor,
 while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

(a) *Winsor v Winsor*, 44 B 682,
57 I C. 116

(b) *Re Davies* 38 Ch D 210. *Re*
Royle, 43 Ch D 18

(c) *Re Medland*, 41 Ch D. 476, 488
492

(d) *M Rowlley's Ed* p. 226

(e) *Re Davies*, 38 Ch D 210

(f) *Vanama v Vanama*, 51 M 849
110 I C. 186

(g) *Procas v Ashulash*, 56 C. 1

Exceptions.—(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

Illustrations.

(i) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong.

(ii) A, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(iii) A sues as executor of the deceased, not being such. He is an executor of his own wrong.

The section. The section explains what is meant by an executor *de son tort* and the nature of interference that makes a person such an executor. The language is obviously borrowed from Williams 'On Executors' (a). This section was not included in the Hindu Wills Act nor was there any corresponding section in the Probate and Administration Act (See below).

2 Executor de son tort. The definition implies a wrongful intermeddling, in however slight a degree, with the assets, a dealing with them in such a way as denotes an usurpation of the functions of an executor and assumption of authority which none but an executor or administrator can lawfully exercise (b). If a person colludes with an executor *de son tort* so that he obtains the property of a deceased person without consideration and defeats or hinders creditors, he thereby becomes responsible as an executor *de son tort* (45 Eliz. c 8). Executors appointed to act after the death of the testator's widow, who was appointed executrix by the will, are not executors and can exercise no function as such. They have rights on the death of the widow to apply for a grant of probate in accordance with the tenor of the will (c). Whether a person is an executor *de son tort* is a conclusion of law to be drawn from certain facts, namely, his acts in relation to the estate (d). An executor who has acted may be compelled to take probate according to English law but not under Indian law (e). An executor *de son tort*, who is not named executor cannot be compelled to take out letters of administration (f). When a

(a) Cited in *Prayag v Siva*, 42 C L J 280 464, 93 I C 385, 43) W. 11 Ed p 177 cited
(b) *Peters v Leeder*, 47 L J Q B 573
(c) *Damodar v Dayal* 11 Bom L

R 1187
(d) *Padgel v Priest* 2 T R 97
(e) *Raghubar v Gadodia* 110 I C 506, *Ayesha Bai v Jacob*, 32 B 364 10 Bom L R 117
(f) *Re Dachs*, 4 Sw & Tr 213

man is in possession of the property of the deceased and holds it adversely to the legatees he is liable to be sued as an executor *de son tort* (a). A person can only be an executor *de son tort* as long as he intermeddles with the estate and his liabilities last as long as he continues dealing with the estate (b).

In order to make a person an executor *de son tort* (1) there must be an intermeddling with the estate of the deceased or the doing of any other act characteristic of the office of the executor, (2) there must be no rightful executor or administrator in existence; (3) the person intermeddling or acting must be neither executor nor administrator.

"The term is equally applicable in the case of an intestacy as in the case of testacy, there being no such term as an administrator *de son tort*. The term is not properly applicable to an executor who acts before probate" (c), for an executor has an inchoate right from the will. Such a person cannot be regarded as a wrongdoer (d).

3. Intermeddles. A person who takes possession of or intermeddles with the estate of a deceased person without being appointed an executor is an executor *de son tort* and is liable both under Hindu and English laws (e), so is an administrator *pendente lite* who intermeddles with the estate of a deceased person after he ceases to be an administrator (f). Living in the house and carrying on the trade of the deceased (g), or disposing of his goods (h), or entering upon the leasehold property of the deceased, paying the ground rent and realising rents from tenants (i) or taking possession of the goods (the bedstead) of the deceased (j), have been held to be sufficient interference to make a man an executor *de son tort*. "A very slight act of intermeddling with the goods of the deceased will make a person an executor *de son tort*" (k), provided the intermeddling is done in such a way as denotes an usurpation of the functions of an executor (l). Similarly a very small interference or intermeddling by the executor appointed by the will with the estate of the testator amounts to an acceptance of office by him and makes him liable as such and he cannot subsequently renounce that character (m).

If a person colludes with an executor or executor *de son tort* so that he may obtain the property of a deceased person without consideration and

- (a) *Zemindar &c v Venkatadri*, 46 M 190, 223, 225, 70 I C 639, fold in *Papubai v Chuhermal*, 114 I C 105.
 (b) *Damodar v Dayal* 11 Bom L R 1187, 1191.
 (c) *Rogers v Frank*, 1 Y & J 409, 414, H xiv 147.
 (d) See *Sykes v Sykes*, 5 C P 113.
 (e) *Magaluri v Narayana*, 3 M 359, 363, 365, cited in *Prayag v Siva*, 42 C L J 280, 462, *Parthasarathy v Venkatadri*, 46 M 190, 227, 43 M L J 486, *Brojo v Saraju*, 51 C 745, 758, 84 I C 154.
 (f) *Jogender v Temple*, 2 Ind Jur N S 234, *Magaluri v Narayana*, 3 M

- 359 fold in *Khitish v Radhika*, 35 C 276.
 (g) *Hooper v Summ-rselt* 145 E R 1157, Wight 16, W 157.
 (h) *Read's Case* 5 Co Rep 336, 77 E R 103, *Nutty v Fagan* 22 L R Ir 604.
 (i) *Williams v Heales*, L R 9 C P 177.
 (j) *Robin's Case* Noy 69, 72 E R 807, W 155 12 Ed.
 (k) W. 155 cited in *Prayag v Siva* 42 C L J 280, 464 5.
 (l) *Peters v Leeder*, 47 L J Q B 573.
 (m) *Ayeshabal v Ebrahim*, 32 B 364 369.

defeat or hinder creditors he thereby becomes responsible as an executor *de son tort* (a) An agent who under the orders of an executor *de son tort* collects the assets of a testator with knowledge of both facts makes himself liable (b). Ordinarily a person is not an executor *de son tort* unless his hand has been the first to take the goods of the deceased He is not an executor *de son tort* if he has received the goods from an executor or an executor *de son tort* (c)

4 Does any act These words mean the performance of duties which are characteristic of the office of an executor or administrator (d) Where a creditor without the knowledge and consent of the executor but under a decree of court receives and retains assets left by a deceased person (e), or "demands the debts of the deceased or makes acquittances for them or receives them", or pays the debts of the deceased out of the assets of the deceased (f), he makes himself liable as an executor *de son tort* "Likewise, if a man sue as executor, or if an action be brought against him as executor, and he pleads in that character, this will make him an executor *de son tort*" (g) A donee under a deed of gift made in fraud of creditors disposing of those gifts after the death of the donor becomes an executor *de son tort* (h) "An agent of an executor *de son tort* collecting the assets with the knowledge that they belong to the testator's estate and that his principal is not the legal personal representative may himself be treated as an executor *de son tort*" (i)

5 Exception 1. It is obvious that it is not every intermeddling with the goods of the deceased which is wrongful Acts which are not destructive of the property and which do not otherwise amount to a conversion of goods are not wrongful or not according to the intent. Milking the cows, feeding the horses locking up the goods, doing repairs and such like acts, if done as an assertion of dominion and act of ownership, would be wrongful, if as an act of necessity or an office of kindness and charity, would be meritorious So the removing and holding possession of the goods if done for the purpose of keeping in safe custody till a lawful representative should appear is lawful, if for the purpose of making away with them, is wrongful And in case of necessity, a stranger may even sell part of the goods or collect sufficient part of the debts for the purpose of burying the deceased without being chargeable as an executor *de son tort* (j) A person is constituted an executor *de son tort* when it is found that he intended to act as the legal representative of the deceased and to represent the estate

- (a) *Magaluri v Narayana*, 3 M 359
 (b) *All Genl. v New York &c*
 (1898) 1 Q B 205, affd in 1899
 A C 62.
 (c) *Magaluri v Narayana* 3 M 359,
 363
 (d) *Prayag v Siva* 42 C L J 240
 405; *Suddasook v Ram* 17 C
 620
 (e) *Sykes v Sykes* L R 5 C P
 113. *Hill v Curtis* 1 Eq 90
 relied on in *Narazbal v Pestonji*
 21 B 400

- (f) W 157 12 Ed, *Narayanamsi v*
Esa Abbayi 28 M 351
 (g) W. 157. 12 Ed
 (h) *Edwards v Harben* 2 T R 537
 W 157 12 Ed
 (i) *Sharland v Mildon* 5 Hare 463 expd
 in *Hill v Curtis* 1 Eq 90. *All-*
Genl v New York &c. (1893)
 1 Q B 205, affd in 1899 A C
 62
 (j) *Peters v Leeder* 47 L J Q B
 573

of the deceased by intermeddling with it (a). Thus locking up the goods for preservation, directing the funeral and defraying its expenses (b), or realising debts to meet funeral expenses suited to the condition of the deceased unless a much larger sum than is reasonable is realised (c), or providing necessaries for children of the deceased, or making an inventory of his property, are offices merely of kindness and charity (d). The giving of a promissory note by a wife to a debtor of her deceased husband was held not to make her an executor *de son tort* (e).

A person who claims by a colourable or paramount title, e.g. by virtue of a lien, even though he may not be able to make out his title completely (f), or a man who takes the goods of the deceased mistaking them to be his own (g), cannot be charged as an executor *de son tort* provided the claim be bona fide. A person who collects the property of the deceased lying in a foreign country is not an executor *de son tort* (h). Where on the death of a person, property passes by survivorship to a surviving coparcener, he cannot be regarded as an executor *de son tort* in respect of the joint family property (i). An executor to whom an order for a grant of probate has been made and who begins to act without taking out probate is not an executor *de son tort* (j).

6 Where there is an executor. A person intermeddling after a rightful executor or administrator has come into existence is not an executor *de son tort*, for there cannot be an executor and an executor *de son tort* at the same time. An executor *de son tort* can only be where no person is clothed with the character of a rightful owner. If a person take possession of a part of the estate of the deceased in the lifetime of the original executors the effect will be to create a privity between him and those who have a legal title to the estate and make him responsible to them. Ordinarily a person is not liable as an executor *de son tort* unless his hand has been the first to take the goods of the deceased (k). A person receiving goods under the authority of the rightful executor whether the latter has proved the will or not can not be charged as an executor *de son tort* (l), the retention of the goods will not make such a person an executor *de son tort* even if his authority be revoked by the death of the rightful executor (m), but will make such a person liable if he proceed to act as executor (n). A person buying goods from an executor or an executor *de son tort* does not make himself liable as an executor

- (a) *Satya v. Sarat*, 30 C. W. N. 565.
 (b) *Harrison v. Rowley*, 4 Ves. 212.
 (c) *Camden v. Fletcher*, 4 M. & W. 372.
 (d) W. 158, 12 Ed.
 (e) *Serle v. Waterworth*, 4 M. & W. 9 on app. 795.
 (f) *Prayag v. Siva*, 42 C. L. J. 280, 466; *Rajah Parthasarathy v. Raja Venkatadr*, 46 M. 190, 228.
 (g) W. 183 cited in *Prayag v. Siva*, 42 C. L. J. 280, 465.
 (h) *Beavan v. Hastings*, 2 K. & J.

724.
 (i) *Ramasami v. Veetappa*, 33 M. 423, 20 M. L. J. 308.
 (j) *Balak Bala v. Jadu Nath*, 57 C. 1358, 34 C. W. N. 634, 129 I. C. 566.
 (k) *Navazbai v. Pestonji*, 21 B. 400, *Tomlin v. Beck*, 1 T. & R. 438, 24 R. R. 95.
 (l) *Sykes v. Sykes*, L. R. 5 C. P. 113, W. 160.
 (m) *Tomlin v. Beck*, 1 T. & R. 438.
 (n) *Cottle v. Aldrich*, 4 M. & S. 175.

de son tort (a), nor does a creditor receiving his payment from an executor *de son tort* (b)

7 Application to Hindu law This section was not applicable to the wills of Hindus not being included in the Hindu Wills Act and no similar provision being introduced in the Probate Administration Act but the principle underlying the section has been made applicable on general principles of equity and good conscience to wills of Hindus and it has been held that a stranger under this section, who takes possession of the assets of a deceased person and who deals with them in such a way as would render him liable as an executor *de son tort* according to English law will be liable just as the heir becomes liable under Hindu law to the extent of the assets that come to his hands (c) The principle that persons intermeddling with the estate of the deceased become liable as executors *de son tort* in respect of estates left by Hindus was first laid down in *Jogender v Temple* (d) Sections 303 and 304 now apply to wills of Hindus (e)

8 While there is no rightful executor or administrator It has been observed in *Narayanamsami v Esa Abbaya* (f) that the rule of English law that when a will is proved or administration granted and another person intermeddles this does not make him an executor *de son tort* does not apply in India where a person dies and the estate is represented under the Hindu law by the heir for, in as much as a Hindu must leave some legal representative a case would never arise in which a party could constitute himself executor *de son tort* The existence of an heir, therefore is not enough Accordingly the words used in the section are 'executor or administrator' Thus where a person immediately after the death of the deceased paid off a debt due to a bank by the deceased and on the same day removed some goods from the shop of the deceased, he made himself liable to the creditor of the deceased as an executor *de son tort* He is not exempted from liability by the fact that the estate was represented by the widow or other heir as personal representative of the deceased (g) It has been pointed out that probate is necessary to complete the title of the rightful executor and until it is taken out a person by intermeddling with the assets can constitute himself an executor *de son tort* (h)

A coparcener in possession of joint family property which passes to him by survivorship cannot be regarded as an executor *de son tort* with regard to it (d)

- (a) *Paull v Simpson* 9 Q. B. 365
reld 10 in *Magalan v Narayana*
3 M 359, *Hill v Curll* 1 Eq
90 *Stratford upon Avon v Parker*
(1914) 2 K. B. 562 *Chayya v*
Subbaji 6 M. L. J. 186
(b) *Harseil v Bird* 65 L. T. 709
W 163 12 Ed
(c) *Radhika v Bonnerjee* 10 C. W.
N 565, *Prayag v Sca* 42 C.
L. J. 280 465 *Rajah Parilasarathy*
v Rajah Venkalad 46 M. 190
232 3 *Suddasook v Ram* 17 C.
620, *Framji v Adaji* 18 B.
337

- (d) 2 Ind. Jur. N. S. 234 cited in *Prosunno*
v Krito 4 C. 342 *Janaji v*
Dharm 14 M. 454 *Suddasook v*
Ram 17 C. 620 *Radhika v*
Bonnerjee 10 C. W. N. 566
Khilish v Radhika 35 C. 276.
(e) *Papurbal v Chuhermal* 114 I. C.
105
(f) 28 M. 351
(g) *Narayanamsami v Esa Abbai* 28 M.
351, *Kanakamma v Venkata alnam*
7 M. 386
(h) *Narabai v Pestonji* 21 B. 400
(i) *Ramasami v Veerappa* 33 M. 423
427

304. (S. 266). When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.

1. The section. The section is not exhaustive, it deals with only some of his liabilities and does not deal with all the rights and liabilities of the executor *de son tort* (a). The rule is laid down in similar language in Williams.

It is a common feature of Hindu law and English law that persons who take the property of a deceased person subject themselves to the liability for the debts of the deceased (b). The liability of an executor *de son tort* is founded on possession only or the factum of dealing with the assets of the deceased. Of course the executor *de son tort* may show that he was not in fact in possession or establish that he has a good title to hold the assets by some other right (c). The policy of the Indian Legislature has evidently been to make the mere fact of intermeddling with the estate and taking possession of the assets a ground of liability (d).

2. Executor *de son tort* is legal representative. Persons who take possession of the estate of a deceased person are liable to be treated as his representative, even though they are themselves liable to be dispossessed by the executor on taking out probate (e).

3. Legal representative The definition given of legal representative in sections 2 (11) C. P. O includes any person who intermeddles with the estate of the deceased, i. e., an executor *de son tort* (f)

4 Has so acted. The mere fact that a person does not profess to act as executor does not relieve him from the liability, as an executor *de son tort* rarely professes to act as such (g)

5. Liability of an executor *de son tort*. He is liable to the extent of the assets that has come to his hands (h), but where he has mixed them with his own in such manner that it is impossible to distinguish the one from the other he has been compelled to treat the whole as liable to restitution. The onus lies on him to show that he has not received so much as will satisfy the plaintiff's claim (i).

(a) *Prayag v Sita*, 42 C. L. J 280, 457

(b) *Magaluri v Narayana*, 3 M. 359 cited in *Radhika v Khilish*, 35 C. 276

(c) *Radhika v Bonnerjee*, 10 C. W. N. 566

(d) *Rajah Parthasarathy v Rajah Venkatadri*, 46 M. 190, 232, 43 M. L. J 486, *Brojo v Saraju*, 51 C. 745, 758, 84 I. C. 154, *Papubal v Chuhermal* 114 I. C. 105, (person in possession of the

property of the deceased holding it adversely to the legatee is liable to be sued as an executor *de son tort*).

(e) *Prosunno v Kristo*, 4 C. 342, *Janki v Dham*, 14 M. 454

(f) *Rajah Parthasarathy v Rajah Venkatadri*, 46 M. 190, 232, 43 M. L. J 486

(g) *Prayag v Sita*, 42 C. L. J 280, 456.

(h) *Lowry v Fulton*, 9 Sim 104

(i) *Magaluri v. Narayana*, 3 M.

His liabilities last as long as he continues to deal with the testator's estate (a) He incurs no liability in respect of payments made by him in due course of administration (b) In English law such payment cannot be pleaded against the rightful representative who is a creditor upon a deficiency of assets (c) An executor *de son tort* is liable for the acts of all persons employed by him (d) He is liable to the rightful executor as also to the creditors of the estate

6 Defences by an executor *de son tort*. As regards defences to a suit by a creditor, an executor *de son tort* may plead *plene administravit* (that he has fully administered) (e) or that he has, before action brought, handed over all the assets in his hands to the rightful representative (f), or has settled accounts with him (g) But it is no answer to the creditor that he has done so after action brought (h), nor can the executor *de son tort* obtain a valid discharge by handing over the assets to another who has never himself become a rightful representative of the deceased (i). An executor *de son tort* cannot retain any portion of the assets of the testator for his own debts (j), unless he later on obtains administration (k) As has been observed, an executor *de son tort* cannot give or specially plead a retainer for his own debt (l), or otherwise "the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him" (m) An executor *de son tort* is not a trustee and therefore may rely on the law of limitation (n)

An agent of an executor *de son tort* is not discharged from liability by accounting to his principal, but is liable as an executor *de son tort* for the law does not recognise the relation of principal and agent amongst wrong-doers (o)

7. Is answerable etc. The executor *de son tort* is liable to be sued by (1) the rightful executor or administrator (2) by a creditor of the deceased, or (3) by a legatee under the will of the deceased (p) So it has been observed that an executor *de son tort* has all the liabilities but none of the privileges of

- (a) *Damodar v Dayal*, 11 Bom L R 1187
 (b) *Padgel v Priest*, 2 T R 97. *Fyson v Chambers*, 9 M & W. 460, 469. *Woolley v Clark*, 5 B & Ald 744 distingd, the executor *de son tort* did not act *bona fide* *Thomson v Harding* 2 C & B 630, 635
 (c) *Mountford v Gibson* 4 East 441, 453. *Elworthy v Sandford*, 3 H & C 330
 (d) *Re Ryan*, (1897) 111 R 513
 (e) *Oxenham v Clapp* 2 B & Ad 309. *Yardley v Arnold* 10 M & W 141
 (f) *Padgel v Priest* 2 T R 97
 (g) *Hill v Curlls* 1 Eq 90, dictum in *Carmichael v Carmichael*, 21 H 101 distingd

- (h) *Curlls v Vernon*, 3 T. R 587; *Layfield v Layfield*, 7 Sim 172
 (i) *Sharland v Mildon* 5 Hare 469. *Hill v Curlls* 1 Eq 90, 100. H xiv 150, see W 162 sq.
 (j) *Coulter's Case*, 5 Co 30, *Curlls v Vernon* 3 T. R 587
 (k) *Pyne v Woolland*, 2 Vent 179 W. 164 12 Ed
 (l) See *Oxenham v Clapp* 3 B & Ad 309, 313
 (m) W. cited in *Narayanamsami v Gsa*, 28 M 351
 (n) *Webster v Webster* 10 Ves 93. *Doyle v Foley* (1903) 21 R 95. *Khetramani v Dhirendra* 41 C 271. *Shrinbal v Ratankal*, 43 B 845, 860
 (o) *Sharland v Mildon*, 5 Hare 469
 (p) W. 161 12 Ed

a rightful executor (a) One executor cannot sue another or enforce his claim against the estate without taking out administration (b)

A person who takes possession of the estate of a deceased person cannot resist a decree of a creditor of the deceased (c) A creditor may sue an executor *de son tort* for the recovery of his claim (d) 'In an action by a creditor he shall be named executor generally (e) It is not necessary to sue the executor *de son tort* as such, provided it appears from the ordinary interpretation of the allegation that he has intermeddled with the estate (f)

8. Procedure. An executor *de son tort* can be sued by a legatee or a creditor in the absence of the legal representative when there is no such legal representative There is, however, some difference of opinion on this point in England (g) It has been held here that a suit lies against the heir alone of a deceased person who has intermeddled with the estate of the deceased and the executor *de son tort* is liable to the extent of the assets received by him (h) But in a suit by a creditor of an intestate against an executor *de son tort* for account and payment it was held in England that a legal personal representative duly constituted should be a party (i) This view no longer prevails It is now settled that a lawful executor or administrator cannot be joined in a suit with the executor *de son tort* but separate suits have to be brought (j) Here it has been laid down that where an executor *de son tort* takes possession of all the assets of the deceased a suit for a general administration can be filed without joining a legal representative but where administration is sought for the entire estate in cases where the executor *de son tort* has taken possession of only a part, the legal representative would also have to be added (k) In a suit brought against the legal representatives of a deceased person upon a promissory note executed by the deceased, the executor *de son tort* is a necessary party (l), but not a purchaser for value of a portion of the assets of the deceased from his legal representative (m)

(a) *Carmichael v Carmichael* 2 Ph 101, *Rajah Pathasarathy v Rajah Venkatasami* 45 M 190 205, *Rayner v Koehler* 14 Eq 262, *Coole v Whittington* 16 Eq 534, but see *Cary v Hills* 15 Eq 79 W 161 12 Ed

(b) *Framji v Adaji* 18 B 337

(c) *Kanakamma v Venkataratnam* 7 M 586

(d) *Framji v Adaji* 18 B 337, *Ratanlal v Narayandas* 51 B 771 29 Bom L R 90 104 I C 794

(e) W 162 12 Ed referring to *Coulter's Case* 5 Co., 20a. See *Meyrick v Anderson* 14 Q B 719

(f) *Prayag v Sira* 42 C. L. J 240 457, *Amlier v Lindsay*, 3 Ch D 194, 205 relied on

(g) *Rajah Pathasarathy v Rajah Venkatasami* 45 M. 190 206 224,

43 M L J 486; *Coole v Whittington* 16 Eq 534, *Khetra mont v Dharendra* 41 C. 271, *Nandlal v Gopal*, 9 Bom L R 316 fold, *Rossell v Morris*, 17 Eq 20 not fold

(h) *Amir v Bajinath*, 21 C. 311

(i) *Cresor Robinson* 14 Bear 569 *Rawlings v Lambert*, 1 J & H 455, *Breadmore v Gregory* 2 H & M 491 496

(j) W 162, 12 Ed See *Peters v Leeder*, 47 L J Q B 573

(k) *Rajah Pathasarathy v Rajah Venkatasami*, 45 M 190 But see *Ratanlal v Narayandas* 51 B 771, 104 I C. 794

(l) *Magalani v Narayana*, 3 M L 359 fold, 10

(m) *Seshayya v Sathai* 6 M L J 155

9 To the extent of the assets, etc. The liability of an executor *de son tort* is limited like that of the heir in Hindu law to the assets that come or may have come, which implies but for his willful neglect or default to his hands (a) He is liable for acts done by others as his agent or under his authority (b) He is liable so far as he has received a particular asset and no further He is not liable to a general account unless he has received everything (c) He is not liable for breach of a covenant to repair (d)

He is protected in all acts not for his own benefit which a rightful executor may do (e) He may recoup himself in damages for all sums he has paid bona fide on account of the testator in due course of administration (f) but not where his acts were not bona fide (g) nor, it would appear can he 'avail himself of this right of recoupment if the rightful representative is a creditor, and there are not sufficient assets to pay his debts (h)

10 Acts of an executor *de son tort* when binding All lawful acts done by an executor *de son tort* in due course of administration shall bind the estate (i) But where the alleged executor *de son tort* does one single act of wrong only of an administrative character that act is not binding upon the estate (j) The acts of the executor *de son tort* will be binding on the rightful representative of the estate where they are lawful : e, such as the true representative was bound to perform (k)

CHAPTER VI

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR

305 (S. 267 P 88) An executor or administrator

In respect of causes of action surviving deceased and rents due at death has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

- (a) *Yardley v Arnold* Car & M 434
Magalan v Narayana 3 M 359
Prayag v Sica 42 C L J 280
 469 93 I C 385
 (b) *Re Ryan* (1897) 1 I R 513
 (c) *Prayag v Sica* 42 C L J 280
 467 citng *Coote v Hillington* 16
 Eq 534 547
 (d) *Stratford upon Avon v Parker*
 (1914) 2 K B 562
 (e) W 162 12 Ed
 (f) *Gyson v Chambers* 4 M & W
 460 469

- (g) *Woolley v Clark* 5 B & Ald
 744 see *Thomson v Harding* 2
 E B 630 635
 (h) H xiv 150 W 165 12 Ed
Mountford v Gibson 4 East 441
 453 *Elworthy v Sandford* 3 H
 & C 330
 (i) *Coultera Case* 50 Co Rep 30a
Thomson v Harding 2 E & B
 630
 (j) *Mountford v Gibson* 4 East 441
 H x v 149 W 166 12 Ed
 (k) *Buckley v Barber* 6 Exch 164

The section The wording of S 83 of the act of 1881 has been adopted. The executor or administrator, it has been stated in S 211, is the legal representative of the deceased for all purposes and all the property of the deceased vests in the executor from the moment of the death of the deceased and in the administrator from the moment of the grant (a). Probate is granted of the whole will and administration of the whole estate of the testator and these do not become ineffectual by degrees as the various legatees die or obtain their legacies. Until the estate has been administered and the will carried into effect, it would seem, that the administration must be regarded as incomplete and the executor remains clothed with the powers given him by law (b). An executor has been held competent to maintain a suit for the recovery of a debt due to the estate of the deceased even after the death of a sole legatee (c). An executor appointed by will, where S 57 does not apply, has all the powers of an executor under the Act, even though such executor does not obtain probate of the will (d).

The rule It is now provided by statute in England that "For any debt (including arrears of rent) due to a deceased person his personal representative shall have the same right of action as the deceased would have had if alive" (e). Thus an executor or administrator may recover debts of every description due to the deceased, either debts of record, as judgments, statutes or recognizances, or debts due on special contracts, as for rent, or arrears of a rent charge, or on bonds, covenants and the like, under seal or debts on simple contract, as notes unsealed, and promises not in writing, either express or implied" (f). "As a personal representative has the same property in the estate devolving upon him as the deceased had when living so he has the same power to bring actions in respect of it" (g). "An executor as such is the owner of the properties of the testator and holds those properties in the right of the testator and not in the right of the beneficiaries. Where the executor is barred, the heir at law or the beneficiary is equally barred" (h). Where both executor and legatee are plaintiffs and on the executor's death no substitution is made in his place, the appeal does not abate against the legatee, though it does against the executor (i).

Cause of action Cause of action means 'every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved' (j).

- (a) *Woolley v Clark*, 5 B & Ald 744, *Chetty v Chetty* (1916) 1 A C 603
- (b) *Umamoy v Raja Janki*, 11 C 248
- (c) *Kaloo v Bibi Ramzo*, 60 I C 350
- (d) *Katreddi v Kadiyala* 49 M 261, 50 M L J 38 94, 1 C 83 F B (see cases discussed)
- (e) Administration of Estates Act 1925, 15 Geo IV c 23 S 26 (1)
- (f) W 489 93 12 Ed
- (g) W 558 12 Ed Thus he can

- sue and distrain for arrears of rent has an absolute power of disposition or sale or of mortgage, or of granting leases
- (h) *Kesho Prasad v Madho Prasad*, 3 Pat 880, 63 I C 812 (headnote)
- (i) *Watkins v Watkins*, 121 I C 177
- (j) *Read v Brown*, 22 Q B D 128, *Murti v Bhola* 16 A 165 170 F, *B. Dampanaboyina v. Ramaswami*, 25 M 736, *Deep Narain v Deert*, 31 C. 274, 8 C W N 207

In other words it means that bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case (a), *i.e.*, anything or all things necessary to give a right of action (b) It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff It refers entirely to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour (c) The expression is to be construed with reference to the substance rather than the form of actions (d) It is on an infraction of a right that a cause of action arises (e)

O 2 r 5, C P C provides that no claim by or against an executor or administrator or heir shall be joined with claims by or against him personally subject to exceptions mentioned therein The object of the rule is to prevent the representative from intermingling the assets of his testator with his own money (f)

O 22 r 3 C P C provides that when a plaintiff or one of several plaintiffs dies pending suit and the right of action survives his legal representative may get himself substituted and continue the suit

306. (S 268. P 89) All demands whatsoever and

Demands and rights of action of or against deceased survive to and against executor or administrator

all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory

Illustrations

(i) A collision takes place on a railway in consequence of some neglect or default of an official and a passenger is severely hurt but not so as to cause death He afterwards dies without having brought any action The cause of action does not survive

(ii) A sues for divorce A dies The cause of action does not survive to his representative

1 The section The section states that all demands and all rights to prosecute or defend any action or special proceeding on which the testator might

- (a) *Dhanitsha v Fforde* 11 B 649
Alusa v Manilal 29 B 363 372
 7 Bom L R 23 24
 (b) *Raghoonath v Gobindnarain* 22 C 45
 (c) *Chand v Parlob* 15 I A 156
 16 C 93 102
 (d) *Duncan Bros. v Jeelmuil* 19 C

- 372 379
 (e) *Nurdin v Alacud n* 12 M 134
 136
 (f) *Tredger v Roberts* (1914) 1 A B 233 287 see *Hafizaboo v Mahomet* 31 B 105 *Jankibhai v Shrinil* as 39 B 120 cf O 18 r 5 Rules of the Supreme Court

have sued or been sued survive his death and are transmitted to his executors or administrators (a) In England the right to sue was given to administrators by St. 31 Edw. III. St I c 11 The rule above laid down has been made subject to two exceptions, namely, (1) causes of action for defamation, assault or other personal injuries not causing the death of the party and (2) cases where after the death of the party the relief sought would be nugatory The section is confined to civil actions only and has no reference to criminal prosecutions (b)

2 Causes of action which survive

(i) *Contract* 'The representation of the deceased, in matters of contract by his executor or administrator is so complete, that, generally speaking, it is not necessary in order to transmit to the executor or administrator a right of enforcing a contract that he should be named in the terms of the contract Thus, if money be payable to B, without naming his executor, yet his executor or administrator will have an action for it So if money be payable to A or his assigns, his executors shall take it, for he is assignee in law' (c) For this reason it has been said that "the executors or administrators of every person are implied in himself" (d) Therefore, they are bound, so far as the assets in their hands permit, to discharge the debts of the deceased of every description that are legally payable and are also bound by the promises and contracts of the deceased (e) e.g., a promise to settle property on a boy taken in adoption thereby inducing his parents to give him in adoption is binding on the heir and on the death of the promisor the property in the hands of the widow was held affected by the contract (f) Similar provision has been made in the Contract Act S 37 which states that 'promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract' But it has been pointed out that the intention of the Legislature as expressed in the Contract Act and in this section makes a large innovation upon the personal law of Englishmen as expressed in the old maxim *actio personalis moritur cum persona*, as well as necessarily upon the personal law of Hindus and Muhammadans Therefore its operation must be strictly confined to persons named in it, viz., executors and administrators and not extended so as to include heirs and other legal representatives An executor or administrator is the only representative of the deceased and his exclusive rights cannot be taken away from him by any stipulation to that effect (g) As to a contract based on considerations connected with the person with whom it is made see *obiter* in *Toomey v Rama Sahi* (h)

(ii) *Implied contract* A testator is liable upon an implied contract also Thus where a testator died of a malignant fever at the house of a friend and the furniture was destroyed under the doctor's advice in order to prevent infection

- (a) See *Darlington v Roscoe*, (1907) 1 K B 219
 (b) *Muhammad v Shaik Dawood* 44 M 417, 40 M L J 351
 (c) W 490, 12 Ed. Walker 147 sq
 (d) *Hyde v Skinner*, 2 P W 197
 (e) See *Toomey v Rama* 17 C 115

- (f) *Bhala v Parbhu*, 2 B 67, see *Rani Chhatra Kumari v Prince Shri Mohan*, 35 C W N 933 P C
 (g) *Sayyad Jiaul v Sitaram*, 36 B 144 12 I C 720, *Muhammad v Niamatan Nasa*, 20 A 88
 (h) 17 C 115, 121, see below

and the friend was obliged to leave the house, *held*, the testator's estate was liable to make good the loss and the payment made by the deceased's executor was allowed (a), so also in case of carriers and bailees (b), or solicitors and clients (c), or in case of breach of trust (d)

(iii) *Joint Contract* "The obligation upon a joint contract devolves upon the survivors and the estate of a deceased contractor is under no primary liability" (e) Co contractors have usually a right of contribution among themselves (f) For wrongful acts of a co partner, every partner is liable both jointly and severally (g), but a deceased partner is not liable for wrongful acts committed after his death (h) In case of a guarantee where it is given once for all the estate of the deceased guarantor is liable after his death (i), in other cases, it is determined on notice of death (j), though not by mere death (k)

(iv) *Promissory note* A promissory note or bill of exchange in favour of the deceased may be endorsed by his executor or administrator (l) He cannot by delivery complete an endorsement by the testator in his lifetime but must endorse it *de novo* (m)

(v) *Promise to pay legacy*, A promise to pay a legacy in remuneration for work done is not binding on the estate (n) and such a claim even when paid has been disallowed (o) After probate has been granted, any legatee who has received the assent of the executor to a legacy can bring and maintain an action in his own right The executor may in such a case be a proper party but is certainly not a necessary party (p)

(vi) *Covenant*. It has been held that in respect of a covenant to repair an executor may sue without averring damage to the personal estate (q)

(vii) *Shares* The representatives of a deceased shareholder in a Company are liable to contribute to the assets of the company in discharge of the liability of the deceased (r) In fact distribution of assets without setting aside sufficient funds to meet calls in respect of shares not fully paid up makes the personal representatives guilty of *devastavit* and personally liable to pay the same (s)

- (a) *Shallcross v Wright*, 12 Beav 558,
Bathany v Walford, 36 Ch D 269
- (b) *Morgan v Raley*, 6 H & N 265
- (c) *Smith v Blyth* (1891) 1 Ch 337
- (d) *Wassell v Leggall* (1896) 1 Ch 554, *Grayburn v. Clarkson*, L R 3 Ch 675
- (e) H XIV 308, *White v. Tyndall* 13 A C 263, *Maxwell's Case*, 20 Eq 585, 592, 598
- (f) *Prior v Henbrow*, 8 M & W 873 889
- (g) *Edinger v. New Sombiero & Co*, 3 A C 1218
- (h) *Friend v Young*, (1897) 2 Ch 421
- (i) *Lloyd v Harper*, 16 Ch D 290, *Re Grace*, (1902) 1 Ch 733
- (j) *Coulthart v Clementson*, 5 Q B D.

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- (k) *Bradbury v Morgan* 1 H & C 249, *Re Silvester*, (1895) 1 Ch 573, *Harris v Fawcett*, 8 Ch 886
- (l) *Bishop v Curtis* 18 Q B 879
Murray v G I Ry Co, 5 B & Ald 204, 216
- (m) *Bromage v Lloyd*, 1 Exch Rep 32
- (n) *Maddison v Alderson*, 8 A C 467
- (o) *Shallcross v Wright*, 12 Beav 558, but see *Baxter v Gray*, 3 M & G 771
- (p) *Watkins v Watkins*, 121 1 C. 177.
- (q) *Rickells v. Weaver*, 12 M & W 718
- (r) *James v Buena & Co*, (1896) 1 Ch. 456 465
- (s) *Taylor v Taylor*, 10 Eq 477.

(viii) *Arbitration* With regard to reference to arbitration the right to enforce the contract does not survive in favour of the legal representative when the matter in dispute is of a purely personal nature. An agreement to refer to arbitration is not revoked by the death of either party before the award if the matter in dispute be not of a purely personal nature (a)

(ix) *Pre-emption* A right of pre-emption under Muhammadan law does not abate on death of the pre-emptor (b)

(x) *Rent* In respect of rent that has accrued due from the testator's life time after his death the executor is to be sued in his representative capacity. In an action for rent that has fallen due after the death of the lessee if the executor enters upon the demised premises, the lessor can elect either to sue him as executor or to charge him personally as assignee and therefore a personal decree may be passed against the executor (c). If he is sued in a representative capacity he can show that the profits or yearly value of the property are less than the rent (d) and his liability is limited to profits he might have received if he had been diligent (e).

3 *Partial abatement* A suit may abate in respect of some of the reliefs asked for and not in respect of the others (f)

4 *Causes of action which do not survive* Generally speaking contracts bind the executor or administrator though not named. Where however personal considerations are of the foundation of the contract as in cases of contracts of principal and agent or of partnership or of master and servant the death of either party puts an end to the relationship and in respect of service after the death the contract is dissolved unless there be a stipulation expressed or implied to the contrary (g). An agreement between master and servant is determined by death of either party (h) unless the intention of the parties was that the remuneration should continue even after the termination of the contract (i). An agreement to write a book or paint a picture is terminated by the death of the party (j).

The representatives of an agent cannot be called upon to render an account in the same sense as the agent himself but may be sued by the principal for any loss he may have suffered by reason of the negligence or misconduct, the misfeasance or malfeasance of his agent. The rule *Actio personalis* does not apply where the act is not a mere tort but a breach of quasi-contract where the claim is founded on breach of a fiduciary relation or failure to perform a duty (k).

(a) *Perumalla v Perumalla* 27 M 112
Dalla v Khedu 33 A 645 11
I C 935

(b) *Muhammad v Namutun* N 131 20
A 88 *Sayyad Jaul v Saram*
36 B 144 12 I C 720

(c) *Maharaja of Burdwan v Parbully*
15 C L J 458 *Rendall v Andreoe*
61 L J Q B 630

(d) *Re Bowes* 37 Ch D 128 133

(e) *Re Bowes* 37 Ch D 128
Whitehead v Palmer (1903) 1 K
B 151

(f) *Atumuga v Namas vaya* 48 M
688 91 I C 109

(g) *Farrow v Wilson* 4 C P 744
see *Toomey v Rama* 17 C 115

(h) *Whitcup v Hughes* 6 C P 78
Ferns v Carr 28 Ch D 409

(i) *Wilson v Harper* (1908) 2 Ch
370 H XIV 305

(j) *Hall v Wright* E. B. & E. Ex
Ch 765 794 H XIV 305

(k) *Kumeda v Asutosh* 16 C L J
282 (see cases cited)

Where the personal quality of a party is a material ingredient in the contract his representatives in interest cannot sue for specific performance of the contract 'unless where his part thereof, has already been performed' (a) The case is different, however, where no consideration of personal trust is involved (b), e.g., a claim to establish a right to office cannot be continued by the representative but the suit abates (c) A claim based on a personal trust does not survive to the claimant's representative The representative of a person alleged to have been appointed a guardian by the will of A was held not entitled to oppose an application to be appointed guardian (d)

The right to sue also does not survive where after the death of the party, the relief sought could not be enjoyed or if granted it would be nugatory, or, where the damage arising out of the breach is wholly personal and does not affect the property of the testator but the executor can sue for any special damage to property that may have accrued on account of the breach Thus an action to recover damages for breach of promise to marry abates on the death of the plaintiff and the executor or administrator is not entitled to continue unless there was special damage to the personal estate of the deceased (e) A probate proceeding set down as a contentious cause abates on the death of the executor and cannot be continued by his heir (f), but on the death of a sole legatee, who had an interest under the will, his heir was held entitled to continue the proceeding in place of the deceased (g)

5 Torts The rule applicable in case of torts is expressed in the maxim *actio personalis moritur cum persona* The rule does not apply to an action for breach of contract committed during the deceased's lifetime but is confined in its application to actions for torts The reason is that breaches of contract are choses in action and form part of the personal estate in respect of which the executor or administrator represents the person of the deceased and is in law his assignee (h) 'Executors and administrators are representatives of the property, that is, of the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate (i) The doctrine *actio personalis etc* does not form part of the law of this country (j)

At common law one could not sue executors for a wrong committed by their testator for which their testator could only recover unliquidated damages Statute

- (a) See Specific Relief Act S 23 (b)
Molendra v Kali, 30 C 265 7
 C W N 229 *Gangabal v*
Khashabal, 23 B 719
 (b) *Palanlandi v Adakalam* 47 M
 459 84 I C 613
 (c) *Sham Chand v Bhayaram* 22 C
 92 See *Joslam v Swami*, 34 M
 76, 5 I C 937
 (d) *Gangabal v Khashabal* 23 B 719
 (e) *Chamberlain v Williamson*, 2 M
 & S 403, *Finlay v Chitney* 20
 Q B D 494, *Quirk v Thomas*
 (1916) 1 K B 516 (special damage).
 W 619 *Balubhai v Nanabhai*
 44 B 446 55 I C 624, but see

- Ricketts v Weaver* 12 M & W
 718
 (f) *Sarat v Nani* 36 C 799 3 I C
 995, *Haribhusan v Manmatha* 45
 C 862, 51 I C 76
 (g) *Phokni v Manki* 9 Pat 698
 128 I C 128 (above case distin-
 guished)
 (h) *Raymond v Fitch* 2 G M & R
 588, 597 The rule is subject to
 some qualifications
 (i) *Chamberlain v Williamson* 2 M &
 S 403,
 (j) *Bhupendra v Chandramoni* 53 C
 987, 100 I C 286, see *Shanifu*
v Mune Khan 25 B 574

3 and 4 W IV c 42 allowed the executors to be sued in certain cases provided the injury was committed not less than six months before the death of the testator (a). Thus an action for deceit will not lie against the representatives of the deceased (b), even the death of the wrongdoer after judgment will put an end to the proceedings (c). Similarly the executors of a co respondent are not liable on his death after judgment (d), for the wrongful acts of a director of a company his executors are not liable to any person who may have suffered loss (e), but the estate of a deceased director is liable for breach of trust (f).

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person are where property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own money. In such cases the action, though arising out of a wrongful act, does not die with the person" (g). A suit by the executors of the deceased has been held to lie for recovery of money spent by him in preserving a trust estate and in discharging the obligations of the trust (h). A cause of action for trespass survives under this section (i).

6 Malicious prosecution A suit for malicious prosecution instituted by the deceased, it has been held by the High Court of Calcutta, is not covered by the Exception but falls within the general words of the section and therefore the right to sue survives (j). It has however been laid down by the other High Courts that where the estate of the wrongdoer does not benefit by the act his executors cannot be sued (k).

7. Death pending appeal With regard to deaths taking place after the conclusion of an original suit and during pendency of the appeal, the rule is that if the suit be decreed the appeal does not abate (l) but if the plaintiff's suit be dismissed

- (a) *Kirk v Todd*, 21 Ch D 484
 (b) *Peck v Gurney*, L R 6 H L 377, *Re Duncan* (1899) 1 Ch 387
 (c) *Phillips v. Homfray* 24 Ch D 439
 (d) *Bydges v Brydges & Wood*, 1909 P 187
 (e) *Shepherd v Bray* (1906) 2 Ch 235, 253, *Oserend &c v Gurney*, 4 Ch 701
 (f) *Re Sharpe* (1892) 1 Ch 154
 (g) See H XIV 312 3 for a lucid treatment of the subject See *Phillips v Homfray* 24 Ch D 439 cited in *Rustomji v Nune*, 44 M 357, 62 I C 260, 270, F. B.
 (h) *Peary v Narendia*, 37 C. 229, *Walters v Woodbridge*, 7 Ch D 504 folk.
 (i) *Adaji Coal Co. v Parnalal*, 57

- C 1341
 (j) *Krishna v Corporation of Calcutta* 31 C 973 8 C W N 745
 (k) *Haridas v Ramdas* 13 B 677, *Phillips v Homfray* 24 Ch D 439, *Peck v Gurney* L R 6 H L 377 relied on, *Punjab v Ramautar* 4 Pat L J 676 52 I C 343, *Rustomji v Nune*, 44 M 357, 62 I C 260 (F. B.), *Aruragappa v Ponnusami*, 44 M 823, 62 I C 757, *Paladappa v Rajah of Ramnad* 49 M 208 92 I C 365, *Alahias v Husb Lal*, 48 A 630 93 I C 590, *Alco'ial v Harasrayan*, 47 B 716, 73 I C 355
 (l) *Muhammad v Akhbar*, 9 A 131, *Gopal v Ram* 26 B. 591, *Murugappa v Ponnusami* 44 M 824, 62 I C 757, *Pattaraja Sundararaja* 26 M 497.

and the plaintiff has appealed and either party dies pending the appeal, the appeal will abate (a)

8. Injuries causing death It is a maxim of common law that a personal action does not survive on the death, either of the person who did, or of the person who sustained, the wrong and, in the absence of statutory provision to the contrary, it still prevails unless the estate is affected by the tort (b) But the rule has been held not to be applicable in this country (c) In England the various statutory enactments relating to compensation for injuries causing the death of a person are consolidated in the Workmen's Compensation Act, 1925 In this country there are two Acts which require to be considered

9. Act XII of 1855. An action lies by an executor, administrator, or representative of a person deceased for any wrong committed in the lifetime of such person for which the deceased may have brought a suit provided (1) it has occasioned pecuniary loss to his estate, (2) the wrong has been committed within one year before his death (3) the action has been brought within one year after his death An action may be brought against an executor, administrator, heir or representative of a person for any wrong committed by the deceased in his lifetime provided the wrong has been committed, (1) within one year before his death, (2) the action has been brought within two years after the wrong has been committed No action commenced under the provisions of the Act shall abate by reason of the death of either party but may be commenced by or against the executor, administrator or representative of the deceased party, who may however set up want of assets as a defence to the action

The Act, as stated in the preamble relates to wrongs which do not survive to or against the representatives of a deceased person It, therefore, does not apply where the right to sue survives (d), nor to an action commenced against the wrong doer in his lifetime but relates only to suits brought against the executors, administrators or representatives of a deceased person for a wrong committed by the latter in his lifetime (e) It does not also apply to a suit to recover property or its value after conversion (f)

10 Act XIII of 1855 This Act permits an action to be brought for compensation to the family of a person for loss occasioned to it by his death by the actionable wrong of another Such action is to be brought by the executor, administrator or representative for the benefit of the wife husband parent and child, if any, of the deceased person Not more than one action is to be brought and that within 12 months after the death of such person A claim for pecuniary loss to the estate may be recovered This Act is *in pari materia* with Lord Campbell's Act, 1865

- (a) *Gopal v Ram* 26 B 597 601,
Sakyahani v Bhavanl 27 M
 548, *Joslam v Sawml* 5 I C
 937, *Saklat v Bella* 2 Rang 91,
 80 I C 744, *Gadgil v Firm of*
Marwadi &c 31 M L J 772
 38 I C 823
 (b) *Addition on Tolls cited in Haridas*
v Ramdas 13 B 677
 (c) *Bhupendra v Chandiamant* 53 C

- 937, 100 I C 286
 (d) *Chunder Monce v Santo Monce*
 1 W R 251
 (e) *Haridas v Ramdas* 13 B 677
Krishna v Corporal on of Calcutta
 31 C 405 *Ramchode v Rukmanv*
 23 M 437, *Padarath v Raja Ram*
 4 A 235
 (f) *Adaji Coal Co v Punnalal*, 57 C
 1341

Plaintiffs cannot recover under this act either nominal damages or a *solatium*, but must show that they have suffered appreciable pecuniary loss by the death of the deceased or had a reasonable expectation of pecuniary benefit, from the continuance of the life of the deceased (a)

In a suit for injunction and damages where it was ordered by consent that the defendant was to purchase the plaintiff's interest in the said property and pay the price to be settled by certain referees and the plaintiff died after the valuation had been made, *held*, that the right to sue survived to the legal representatives of the deceased plaintiff (b)

Before this Act the law that prevailed was embodied in the maxim *actio personalis &c*. But this Act conferred the right of action to the executor or administrator or representative of the deceased. A son adopted by the widow of a deceased Hindu is the legal representative of the deceased and he is entitled to maintain a suit under this Act. Such an adopted son is not, however, entitled to any portion of the damages awarded in the suit allotted to him as a child of the deceased (c). Similarly it has been pointed out that the relations of a person whose death was caused by the wrongful act of another were not, prior to its enactment, entitled to claim compensation on account of his death. The right to claim, compensation in such a case was created by the Act. The word 'representative' is not limited to the executor or administrator, neither does it extend to heirs generally, but includes all or any of the persons for whose benefit a suit under the Act can be maintained. The beneficiaries are not entitled to compensation jointly but are parties entitled to relief severally in respect of the same cause of action which is enforceable at the suit of all or any one of them suing for himself and the rest. The case is analogous to a joint decree holder who can, with the permission of the Court, take out execution of the decree for the benefit of himself and the other decree holders. Query, Whether the running of time under the Act is suspended by any disability (d)

11. Measure of damages. The principle upon which damages are to be assessed is that of loss of which a pecuniary estimate can be made, and, therefore, compensation in the form of a *solatium* cannot be given. Pecuniary advantage means not only that to which the deceased was legally entitled but of which he had a reasonable expectation (e). Distinct evidence of the loss sustained or benefit expected is not necessary and the amount of compensation is to be determined by a consideration of all the circumstances (f)

- (a) *Narayan v Municipal &c* 16 B 254, *Sykes v N & Ry Co* 44 L. J. C. P 191, *Duckworth v Johnson*, 4 H & N 653 *referred to*
 (b) *Choonamoney v Ram Kinkar* 28 C. 155, 5 C. W N 242
 (c) *Vinayak v G I P Ry Co*, 7 B H C R O C 113
 (d) *Johnson v Madras Ry Co* 28 M 479

- (e) *Ratanabai v G I P Ry Co*, 8 B H C. R O C 130
 (f) *Kallydas v G I Ry Co*, 2 C. W N 609 632, reversed on another point in 23 C. 401, *Vinayak v. G. I P Ry Co*, 7 B H. C. R. O C. 113, *Narayan v Municipal Commissioners &c*, 16 B 254 (Difficulty in assessing compensation pointed out)

307 (S 269 P 90). (1) Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit

Power of executor or administrator to dispose of property

Illustrations

(i) The deceased has made a specific bequest of part of his property. The executor not having assented to the bequest, sells the subject of it. The sale is valid.

(ii) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely —

(i) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

(ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or

(b) lease any such property for a term exceeding five years

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed thereto a copy of sub-section (1) and clauses (i) and

(iii) of sub-section (2) or of sub-section (1) and clauses (i) and (iii) of sub-section (2), as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

1. Change. The words 'subject to the provisions of sub section (2),' occurring in sub sec. (1) and the words 'If the deceased was a Hindu namely —' in sub sec (2) are new There has been a change in the numbering of the sub sections The six sub sections of the Probate and Administration Act have been reduced to four in this Act

2 The section The section deals with the rights of executors and administrators to deal with estates of deceased persons *qua* executors and administrators, i.e., not as persons having any beneficial interests in those estates. Except in respect of cases coming under sub section (2) an executor or administrator has absolute right of disposal over the entire property of the deceased and there is no distinction between the powers of an executor and an administrator after the grant In the case of Hindus *etc*, sub sec (2) imposes restrictions on the powers of administrators so that they do not occupy the same position as executors (a) These restrictions however have no application when the administrators deal with their interests not as administrators but as persons beneficially interested (b) With regard to the power of an executor, it has been laid down that he 'may dispose of the assets of the testator, that over them he has absolute power, and that they cannot be followed by the testator's creditors. It would be monstrous if it were otherwise, for then no one would deal with an executor' (c) In the case of Hindus, *etc*, however, the powers of an executor, are subject to restrictions imposed by the will (sub sec 2) (d) 'The principle is that the executor or administrator in many instances must sell in order to perform his duty in paying debts, *etc*, and no one would deal with an executor or administrator if liable afterwards to be called to account' (e) The word 'administrator' in this section includes an administrator under a limited grant who can dispose of property like an ordinary administrator (f) This section does not draw any distinction between real and personal properties and the executor or administrator has the same power to deal with either classes of properties (g) The title of the legal representative is not affected

(a) *Ramdhon v Sharf ud-dn* 34 I C. 128, see *Lee Lim v Saw Mah*, 2 Rang 4 79 I C. 729

(b) *Joges v Mohim*, 11 C W N 2212.

(c) *Hale v Booth* 4 T R. 625 1 n

(d) *Narayanasami v Ramasami*, 54 M.

L J 677, 109 I C. 47

(e) W' cited in *Bazayet v Doolchand*, 5 L A 211, 221

(f) *De Silva v De Silva*, 27 B. 103

(g) *Eastern Mortgage Co. v Rehal*, 3 C. L J 20 267, *Soleman v. Rahimzai*, 6 B W L R 850.

by mortgage of his interest by a legatee and not even by a mortgage decree against the legatee (a) S 90 of the Probate and Administration Act did not apply to the Administrator General (b)

3 Conveyance by executor Where a party professes to convey all his estate and interest in particular lands, the operation of the conveyance is not limited to the estate which is vested in him in the character in which he purports to join in the conveyance (c) It is immaterial therefore whether the sale or mortgage is made in the capacity of an executor or absolute owner or beneficial owner A sale by an executor is presumed to have been made in the ordinary course of administration and where a person has several estates and interests in land and he conveys all his estates and interests every estate and interest vested in him will pass by the conveyance (d) The title of the purchaser is not affected even if the administrators do not describe themselves in the conveyance as administrators but as heirs and as heirs their right to sell extends to only a part of the property conveyed (e) But this principle will not apply if the vendor does not join in the conveyance as executor but joins as absolute owner (which he is not in fact) It is the true interpretation of the deed that has to be ascertained (f) In case of a sale or mortgage by an executor of the testator's property the ordinary presumption is that the executor acted in the discharge of his duty unless there is something in the transaction which shows the contrary (g) But where an executor does not enter into the transaction as executor and is not known by the other party to be the executor then the other party cannot show that he was in fact dealing with the executor (h) The power given to an executor is presumed to be annexed to his office and therefore is exercisable by the holder or holders thereof for the time being and is not intended to be personal unless clearly so indicated (i) An executor who renounces is therefore not capable of exercising such power (j)

An executor may be presumed by a bona fide purchaser or mortgagee to be dealing with the estate for the purpose of the administration, unless there is something in the transaction which shews the contrary, and may give a valid title to it. Such purchaser or mortgagee will not be bound to look to the application of the money nor will he be liable by the mere absence of a statement of the purpose for which the money has been obtained on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's

- (a) *Soundarathan mal v Naranaswami*
42 M L J 567
- (b) *Saraswati v Adm Genl* 23 C 580
- (c) *De Silva v De Silva* 27 B 103
- (d) *Suleman v Rahimula* 6 Bom L R 850 see *Gopal v Mudumutt* 14 B L R 21 *Muthial v Metheral* 64 I C 397
- (e) *Pronat v Surja* 19 C 26 345
- (f) *Pura v Bijral* 37 C 362 see *Bank of Bombay v Suleman* 33 B L 10 Bom L R 1065 P C

- See *Numbermal v Veerapermal* 59 M L J 596
- (g) *Re Venn & Furze Contract* (1894) 2 CI 101 114
- (h) *Solomon v Allenborough* (1912) 1 Ch 451 1913 A C 76 W 696 f n 11 Ed
- (i) *Re Smith* (1904) 1 Ch 139, *Crawford v Forshaw* (1891) 2 Ch 261
- (j) *Crawford v Forshaw* (1891) 2 CI 261 *All Genl v Fletcher* 5 L J Ch 75 *Keates v Burton* 14 Ves 34 11 XIV 304

debts (a) A purchaser from an executor is not bound to enquire whether debts or legacies have remained unpaid (b) An executor of a Muhammadan will can validly convey the testator's immovable property even without taking out probate (c).

4. Where there is collusion. Where there is collusion between a purchaser or mortgagee and the executor the alienation is void (d), but that an executor may waste the money is not alone sufficient to invalidate the sale or mortgage (e). Where there is collusion, a creditor or legatee may follow the assets (f), provided he enforces his right within a reasonable time before the claim becomes barred by acquiescence (g) If a purchaser cognizant of the fraud buys at a low price he may be made liable for the full value (h). If there is a reasonable doubt as to the person entitled to a fund or the capacity of a person to give a valid discharge for the fund, a trustee (or personal representative) is entitled to protect himself by payment into Court (i). Under this section, therefore, an executor has power to dispose of the property for all purposes binding upon the estate, and even where the executor deals with the property for purposes not strictly binding on the estate, the alienation, such as a sale or mortgage, cannot be questioned so as to defeat the *bonafide* alienee who had no notice of the fact that the executor was using his powers for purposes not binding upon the estate. But the principle does not apply where the alienation is made for purposes not binding upon the estate and the alienee has notice of that fact (j)

5 Alienation by an executor. Executors may validly assign the bulk (k) or the whole (l) of the testator's estate to secure the payment of a creditor or creditors. Large powers of alienation have been given to executors so that they may not be impeded in their work of administration and the title of the purchaser may not be rendered unsafe or uncertain (m) Thus, a sale by an executrix, 29 years after the testator's death, of a leasehold charged with the payment of an annuity without the concurrence of the annuitant has been held good (n). Although lapse of time is immaterial, evidence of payment of debts is a material factor, for in face of such evidence an alienation by an executor cannot be upheld (o).

- (a) *Corser v Cartwright*, 7 H L 731,
Re Henson (1908) 2 Ch 356,
Sooileman v Rahimtula, 6 Bom L
R 800, *G Narayanasami v*
Ramasami 54 M L J 677
(b) *Re Tanqueray Williams* 20 Ch
D 465, *Re Whistler*, 35 Ch D
561
(c) *Mahomed v Hargovandas*, 47 B
231, 70 I C 269,
(d) *Mead v Orery* 3 Atk 235
(e) *Whale v Booth* 4 T R 625 n
(f) *Hill v Simpson*, 7 Ves 152,
McLeod v Drummond, 17 Ves
152
(g) *Andrew v Wrigley*, 4 Bro C C
125, *M Leod v Drummond*, 14
Ves 353, 359, 363, 17 Ves 152
(h) *Ever v Corbel*, 1 P W 148,

- Rice v Gordon* 11 Beav 265
(i) *Re Parkers Will Trusts*, 39 Ch
D 303
(j) *Numbermal v Vetraperumal* 59
M L J 596, 128 I C 689,
Tarakeswar v Ambika 55 C 892,
47 C L J 569
(k) *Earl Dane v Rigden*, 5 Ch
663
(l) *Wolverhampton &c. v Marston*,
7 H & N 148
(m) *Walker* 180-l.
(n) *Re Whistler*, 35 Ch D 561
(o) *Re Molyneux &c.*, 15 L R Ir
383, *Re Verrell's Contract*,
(1903) 1 Ch 65 (18 years after
testator's death), *Attenborough*
Solomon, 1913 A C. 76

Personal representatives may dispose of legal and equitable assets or mere choses in action (a), and even assets specifically bequeathed (b). They may pledge for administration of the estate and the pledgee may sell if the articles are not redeemed within the proper time (c).

An executor's power, however, is limited where the power of the deceased to deal with the estate was limited. Thus the executor or administrator of a surviving trustee stands on no higher ground than an ordinary trustee and therefore cannot alienate property if not warranted by the terms of the trust (d). A power implying a personal confidence does not pass to the executors (e), but this view has been challenged and it has been held that powers exercisable by trustees pass *prima facie* with the office to the holders for the time being (f). The mere fact that the testator intended that the property should not be divided till the minors attained the age of 21 does not give rise to the inference that the testator intended to impose any restriction on the power of alienation of the executor (g).

On the principle *delegatus non potest delegare* an executor cannot delegate his power where a personal trust or confidence is reposed in him but must exercise his own judgment and discretion. Thus it has been held that he cannot contract to sell by attorney (h). But the rule is confined merely to a discretionary act. An executor may assign and give a valid power of attorney to collect debts due to his testator (i).

An executor once having assented to a legacy under S 333 is not competent to deal further with the property. Although under this section, an executor can dispose of the property of the deceased in such manner as he thinks fit it has been said he must be able to give reasons for doing so (j). This observation it may be remarked either means nothing or unduly restricts the power of the executor for the mortgagee or purchaser is not bound to see to the necessity of the sale or mortgage or to the application of the fund. The transaction will be binding even if there be no necessity for the alienation unless it be apparent on the face of the proceeding that there is no such necessity (k). As the executor has complete and absolute control over the property of the deceased nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor which will vitiate any transaction whatever (l). In *Radha v Jogesh* (m) the

(a) *Nugent v Gifford* 1 Atk 463.
Vane v Rigden 5 Ch 663 667.
Graham v Drummond (1896) 1 Ch 963.

(b) *Ewer v Corbet* 1 P W 148.
Taylor v Hawkins 8 Ves. 209.
Hood v Lord Barrington 6 Eq 218.

(c) *Russell v Plalce* 23 L J Ch 441.

(d) *Walker* 197. *Lewis* 568.

(e) *Cole v Wade* 16 Ves. 27. *Forbes v Forbes* 18 Bear 552 (power to select a site).

(f) *Re Smith* (1904) 1 Ch 139 144.
Crawford v Jarshaw (1891) 2 Ch.

261 see *Re Crunden and Meux's Contract* (1909) 1 Ch 690.

(g) *Shemall v Sheikh Ahmed* 33 Bom L R 1056.

(h) *Combe's Case* 9 Co 75.

(i) *W 598* 12 Ed Vane v Rigden 5 Ch 663 see *Greenwell v Porter* (1902) 1 Ch 530.

(j) *Mastle v Jotindra* 28 C L J 141 47 1 C 289.

(k) *Colver v Finch* 5 H L C 905 923. see *Verrell's Contract* (1903) 1 Ch 65.

(l) *Vane v Rigden* 5 Ch 663 668.

(m) 50 L C. 479.

title of the executrix to act as such was doubtful, but in as much as she was, as a matter of fact, in her dealings with others, acting as such and the mortgagee had acted in good faith in advancing money to her, the transaction was held good

6 Sub-section (1). This sub section embodies the English law as to personality (a). It applies to executors as well as to administrators and the words, "power to dispose of," include any disposition by way of sale, mortgage, charge, exchange or lease, and may also include a gift—though the validity of the gift will be dependent upon the consent of the beneficiaries (b). An executor or administrator has authority to sell or mortgage the testator's property in due course of administration and give a complete title to the purchaser or mortgagee free from the charge or trust that may have been imposed by the testator for payment of a legacy (c). But where alienees have constructive notice of a charge created by the will, the alienation will be subject to the charge (d), so also where the alienee knows that money is not wanted for purposes of administration the alienee holds subject to the claims of creditors and beneficiaries (e). Onus lies on the person seeking to set aside the alienation to prove knowledge of the alienee of the true state of facts (f). The alienee is not bound to enquire whether the legacy charged on his estate by the testator has been paid and, unless he has express or constructive notice of the charge, the alienee acquires a valid title unaffected by the charge (g).

The executor or administrator may sell a part of the estate to a creditor at a fixed price in discharge of the debt (h) or sell the share of a deceased partner to the surviving partners (i). A power of sale out and out does not authorise the executor or administrator to create a mortgage unless the power is given for raising a particular charge only (j). But the contrary view has also been taken, namely, an executor who is given power by the testator to sell has power to mortgage the property unless prohibited from doing so by the testator (k). A power of sale would not justify a sale either of timber (l) or minerals (m) apart from the land without the sanction of Court. As to sale by an executor

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| <p>(a) <i>Ma Sein v Chetty Firm</i>, 3 Rang 443 450</p> <p>(b) <i>The Eastern Mortgage &c v Reboll</i>, 3 C. L. J. 260, 266, <i>McLeod v Drummond</i> 17 Ves 152, 154, <i>Vane v Rigden</i>, 5 Ch 663</p> <p>(c) <i>Bazayet v Doolichand</i>, 5 I. A. 211</p> <p>(d) <i>Bank of Bombay v Suleman</i> 33 B. 1, 10 Bom. L. R. 1065 P. C. see <i>Hill v Simpson</i>, 7 Ves 152, <i>Namberumal v Veeraperumal</i>, 59 M. L. J. 595</p> <p>(e) <i>Ricketts v Lewis</i> 20 Ch. D. 745, <i>Re Verrell's Contract</i>, (1903) 1 Ch 65</p> <p>(f) <i>Corser v Cartwright</i>, L. R. 7 H. L. 731.</p> <p>(g) <i>Corser v Cartwright</i>, L. R. 7 H. L. 731 743, <i>Greender v Macintosh</i>, 4 C. 697.</p> | <p>(h) <i>Hepworth v Haslop</i>, 6 Hare 561; <i>Vane v Rigden</i>, 5 Ch 663, 668</p> <p>(i) <i>Chambers v Howell</i> 11 Beav. 6.</p> <p>(j) <i>Stroughill v Ansley</i>, 1 D. G. M. & G. 625, <i>Ball v Harris</i> 4 My. & Cr. 268, <i>Haldenby v Spofforth</i> 1 Beav. 390, <i>Cook v Dawson</i> 29 Beav. 123, <i>Kantil v Kristo</i>, 3 C. W. N. 515, <i>Deeno Moyee v Tarrachurn</i>, 3 W. R. M. S. p. 7 1 p. 2, <i>Zainab v Chetty Firm</i>, 51 I. C. 565, <i>Chettyar Firm v Tan Ma</i> 6 Rang 411</p> <p>(k) <i>Puma v Nafin</i> 8 C. W. N. 362, <i>Rajani v Ramanath</i>, 23 C. 903 fold, <i>Narejanasami v Ramasami</i>, 4 M. L. J. 677 109 L. C. 47, <i>Parthasarathi v Alukundammal</i>, 45 M. 667, 68 I. C. 856.</p> <p>(l) <i>Cholmeley v Paxton</i>, 3 B. & 2 207</p> <p>(m) <i>Buckley v Howell</i>, 29 Beav. 546.</p> |
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devises or legatee see Halsbury (a) An executor or administrator may sell (b) but not in satisfaction of his private debt (c)

'The property alienated cannot be followed into his (the purchasers) hands by either creditor (d) or legatee (e) The right of the heir is a right *in personam* against the executor (f) The title of the alienee will not be affected by the fact that a long time has elapsed between the death and date of the alienation (g) nor by the fact that the alienation does not purport to be made for administrative purposes (h), nor to be executed by the representative in his character of representative (i)

An executor or administrator may deal with a claim or debt as owner of the estate and may, therefore pay on such evidence as he thinks sufficient may accept any compensation or security for any debt and may compromise compound abandon submit to arbitration or otherwise settle any debt account or claim relating to the estate of the deceased (j) Two or more personal representatives may join in distraining or may distrain alone for the whole rent due for they are regarded in the light of an individual person (k)

7 Mortgage An executor has full power to mortgage, *eg.* for the immediate wants of the estate (l) and his authority under this sub section is not fettered by any stipulation in the will (m) This power has been recognised by the Courts in this country unless in the case of Hindus, *etc.* its exercise has been prohibited by the terms of the will (n) An executor may not only pledge or mortgage assets for the purpose of administration but may give the mortgagee a power of sale (o) A power to raise money by mortgage or sale authorises a mortgage with a power of sale (p) Executors have authority to confer a power of sale on the mortgagee (q)

- (a) XIV 298 sq
 (b) *Re Cavendish & Arnold's Contract* 1912 W N 83
 (c) *M Lead v Drummond* 17 Ves 152 170, *Haynes v Forshaw* 11 Hare 93 *Re Morgan* 18 Ch D 93 *Richells v Lewis* 20 Ch D 745
 (d) *Nugent v Gifford* 1 Atk 463 *Elliot v Merriman* 2 Atk 41
 (e) *Gwer v Corbet* 2 P W 148 *W hale v Booth* 4 T R 625 n
 (f) *Al Imunnisa v Sirdar Ali* 29 Bom L R 434 102 I C 129
 (g) *Re Whistler* 35 Ch D 561 *Re Venn and Furses Contract* (1894) 2 Ch 101
 (h) See *Colyer v Finch* 5 H L C 905 923 *Corser v Cartwright* L R 7 H L 731
 (i) 11 XIV 296 7 *Re Venn and Furses Contract* (1874) 2 Cl 161 *Re Henson* (1904) 2 Cl 366 361

- (j) Walker 190
 (k) W 511 12 Ed
 (l) *Earl Vane v Rigden* 5 Ch 663 *Child & Co v Thorley* 16 Ch D 151
 (m) *Tawalikul Husain v Ajodhya Bank* 54 I C 321
 (n) *Rajani v Ramanath* 3 C W N 483 *Purna v Nabin* 8 C W N 362 *The Eastern Mortgage v Reball* 3 C L J 260 266 *Re Nunda* 23 C 908 *Mfa Selu v Chetty Firm* 3 Rang 443 450 1 *Kanli v Kristo* 3 C W N 515 is not opposed to this view see *Child v Thorley* 16 Ch D 151
 (o) *Russell v Plalce* 18 Beav 21 *Thorne v Thorne* (1893) 3 Ch 196 see *Cruikshank v Duffin* 13 Eq 555
 (p) *Re Chambers Hill* 8 Eq 567
 (q) *Scale v Brown* 1 A 710 F D

A mortgage not in conformity with the terms of a will is invalid, *e.g.*, where the will directs a mortgage to be made to A but it is, in fact, executed in favour of B (a), or where a larger amount is borrowed than that directed by the testator (b). But such a mortgage even though not in accordance with the terms of a will is valid if made by virtue of power conferred on the executor by law independently of the will (c). Representatives cannot invest on second mortgages (d) or on stock mortgage (e) or on contributory mortgage (f). An executor who has once released an estate from liability under a mortgage executed by the testator cannot charge it again, particularly where the assets sought to be charged are, on the testator's death, vested in the heir and so never vested in the executor (g). A mortgage effected with the written consent of every beneficiary may fairly be regarded as in substance a mortgage by the beneficiaries themselves (h). "The power to mortgage is not taken away by a decree for administration where no receiver has been appointed and no injunction granted" (i).

"The title of a person who lends money to another, not known by the lender to be, but who is in fact, an executor, for his private purposes, upon an equitable mortgage of what is really the testator's property, is postponed to the prior equity of the persons beneficially interested in the property" (j). Fraud or collusion on the part of the lender will vitiate the transaction (k).

An executor can pledge the goods of the testator. The proviso to S 178 of the Contract Act has no application to the case of a sole executor transferring to himself the goods (shares in this case) of the testator with the fraudulent intention of misappropriating the same and then in his personal capacity pledging them with a third party who has no knowledge of the fraud (l).

8. Executor's power to borrow money In the absence of any special power given to the executor to borrow, or to charge the estate for loans made to the executor for the benefit of the estate, an executor cannot render the estate liable for moneys borrowed by him for the purposes of the estate, even though at the time of the advance it might have been represented to the lender that the money was required for the purposes of the estate (m). An executor is only personally liable and cannot be sued as executor so as to get execution against the assets of the testator (n). Even where an executor takes a bond given to him as executor he can

- (a) *Vaughan v Heselline*, 1 A 753
- (b) *Deeno Moyee v Tarachum*, 3 W R Mis App 7 f n
- (c) *Gopalnarain v Muddomuffi*, 14 B L R O C 21, 45 6
- (d) *Norns v Wright*, 14 Beav 291, 308; *Lockhart v Reilly*, 1 D G & J 464, 476; *Chapman v Browne* (1902) 1 Ch 785
- (e) *Whitney v Smith*, 4 Ch 513
- (f) *Webb v Jonas* 39 Ch D 660. *Re Dice*, (1909) 1 Ch 328
- (g) *Cassibi v Ransordas*, 4 B 5
- (h) *The Eastern Mortgage v Reball*, 3 C. L. J 260
- (i) W. 695 *Berry v Gibbons*, 8 Ch 747, *Halley v. O'Brien*, (1920) 1

- It 149
- (j) *Re Morgan*, 18 Ch, D 93
- (k) *Vane v Rigden*, 5 Ch 663, *Mead v Onery*, 3 Atk 235, 240, *Whale v Booth*, 4 T R. 625 n H XIV 297
- (l) *Sethna v. National Bank &c.*, 12 Bom L. R 870
- (m) *Romanath v Kanai*, 7 C. W. N 104, *Farhall v Farhall*, 7 Ch 123 relied on.
- (n) *Farhall v Farhall* 7 Ch 123, *Labouchere v Tupper*, 11 Moo P C 198, *Debendra v Radhika* 8 C W. N 135, *Debendra v Hem* 31 C 253; *Byramji v Heerabai*, 11 Bom L. R 250

only sue in his personal capacity (a) for when he signs himself as executor these words are words of description and do not qualify his liability (b) An executor borrowing in the course of administration for the purposes of the estate though personally responsible for the payment of such debts is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made (c) An executor who pays a debt due by the estate may retain the amount (d)

9 Executor's power to carry on the testator's business An executor or administrator has no power to carry on the business of the testator (e) except for the purpose of winding it up (f) Unless authorised by the testator an executor cannot employ general assets of estate in the business (g) but only the assets already embarked (h) His authority to carry on the business may be implied e g from a general power to postpone the conversion of the testator's estate bequeathed upon trust for sale (i), but the executor cannot carry on the business indefinitely (j) Even in the absence of express authority an executor is not bound to close the business immediately but try to preserve it as an asset (k) and he incurs no liability if he continues the business for the purpose of realisation provided he has acted *bona fide* (l) He has no power to borrow money or charge assets outside of his business for repayment of the loan (m) unless he is expressly authorised to increase the business (n) It is well established that an executor carrying on the trade of his testator under a testamentary trust is liable personally to his trade creditor and is entitled to use as a trader the trade assets of the testator He does not violate his trust by carrying on the trade in conjunction with his co executor who is not named as a trade trustee He has a lien on the specific assets of the testator appropriated for the purpose of business and can charge its assets (o) notwithstanding the fact that he avowedly contracts as representative (p) He is entitled to be reimbursed out of the estate in priority to the claims of creditors if the liabilities have been properly incurred and for a reasonable length of time to sell the business as a going concern (q)

- (a) *Haser v Lord Arundell* 3 Bos & P 7 but see *Commissioners of Stamps v Hope* 1891 A C 476
 W 531 12 Ed see *Cassal v Ransordas* 4 B 5
 (b) *Price v Taylor* 5 H & N 540
Dutton v Marsh 6 Q B 261
 (c) *Sudhir v Gobinda* 45 C 538
 41 J C 503
 (d) *Boyd v Brooks* 34 Beav 7 on app 34 L J Ch 605
 (e) *Airman v Booth* 11 Beav 273
 (f) *Collinson v Lister* 20 Beav 356
 (g) *Ex p Garland* 10 Ves 110
 (h) *Cutbush v Cutbush* 1 Beav 184
Jethabhai v Chotalal 34 B 209
 (i) *Re Hodson* 3 Madd 138
 (k) *Re Chancellor* 26 Ch D 42
Re Smith (1896) 1 Ch 171
 (l) *Re Smith* (1891) 1 Ch 171
 (m) *Stickland v Symons* 22 Cl D 671
 (n) *Garrell v Noble* 3 L J Cl

- 159 *Sudhir v Raseswari* 35 C L J 46 69 1 C 796 executor held liable because he continued business indefinitely without leave of Court and contrary to terms of the will
 (m) *McNeill v Acton* 4 D G M & G 744
 (n) *Re Dimmock* 52 L T 494
 (o) *Jethabhai v Chotalal* 34 B 209
 12 Bom L R 1 *Re Morgan* 18 Ch D 93 *Owen v Delamere* 15 Eq 134 *Re Evans* 34 Cl D 597 *Sudhir v Gobinda* 45 C 538 21 C W N 1643 but see *Re Orley* (1914) 1 Ch 604
 (p) *Lalouchere v Tupper* 11 Moo P C 193 *Liverpool &c v Walker* 4 D G & J 24
 (q) See *Dowse v Gorton* 1891 A C 190 192 also *Jethabhai v Chotalal* 34 B 209 12 Bom L R 1

The onus lies on the executor to show that he acted with a view to sell the business as a going concern (a) An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration, even when it is necessary to carry on a business left by the testator (b)

10 Executor's right to appropriate If a legatee be *sui juris* the executor may make a bargain with him, not to insist upon the payment of his vested legacy in cash, but to take over a portion of the assets at the market value, and so to pay him (c) Appropriation may be thus made in favour of a residuary legatee provided he does not get more than his share of the assets (d), or in favour of a legatee who is also an executor in advance of final division of the testator's assets (e) A legatee has a right to require the amount of his legacy to be invested by the executor when the legacy is vested in interest but payable in future and this would amount to appropriation but no such appropriation can be required to be made where the legacy is purely contingent, although the executor is at liberty to set aside a sufficient sum for the legacy without being liable for the loss, in case any loss arises (f) 'Where an appropriation in the strict sense of the word has been made, all profit and loss, as the case may be, in respect of the appropriated fund goes to or falls upon the legatee' (g)

11. Executors right to compromise claims Very large powers of compromising claims are given to the personal representatives if they act fairly An executor acting honestly can admit the claim of his co executor although he would do well to apply to Court (h) Settlement of an account by one of several executors is binding upon the others (i), but a beneficiary is entitled to challenge a settlement arrived at between the trustee and one of their number (j) A compromise prejudicial the estate will not be upheld (k) Where disputes were settled by a consent decree and by the execution of a *kabuliyat* one of the parties was not allowed to turn round and contend that the *kabuliyat* was not binding on him (l) But where an executor or administrator enters into a compromise in excess of his powers the compromise is not lawful and may be set aside (m) Executors cannot by compromise obtain a declaration that the will is valid or make the estate liable for payment to be made to any person (n) A compromise between parties may be superseded by a judgment of Court (o)

12 Executor's power to endorse notes and bills "Executors or administrators may endorse and assign over a promissory note payable to the deceased

- (a) *Re Millard* 72 L. T. 823 See H XIV 293 sq where the law is clearly stated
(b) *Sudhir v Kamal*, 21 C. W. N. 1043, 41 I. C. 503 (executors personally subject to their right of indemnity against the estate if the borrowing was necessary)
(c) *Re Salaman*, (1907) 2 Ch. 46 50
(d) *Re Levine*, (1892) 1 Ch. 210
(e) *Re Richardson* (1896) 1 Ch. 512
(f) *Re Hall* (1903) 2 Ch. 226 231
(g) H XIV 303, *Burgess v Robinson*, 3 Mer. 79, *Kimberley v Tew*, 4 Dr. & W. 139, 149, *Re Hall*,

- (1903) 2 Ch. 226 231
(h) *Re Houghton* (1904) 1 Ch. 622
(i) *Smith v Ezerell* 27 Beav. 446 454
(j) *Re Fish* (1893) 2 Ch. 413
(k) *Yell v Lord*, 31 L. J. Ch. 391, *De Cordoba v De Cordoba*, 4 A. C. 692
(l) *Sita v Baroda* 28 C. W. N. 444, 446.
(m) *Sarvesh v Hari* 14 C. W. N. 451
(n) *Graham v M. Cashin*, (1901) 1 R. 404
(o) *Ram Prasad v Mahabir*, 220, 79 L. C. 803

or his order (a) But they cannot deliver a note on which the deceased wrote his name (b) They may however fill up the blank space for the drawer's name with their own names and so make the instrument a complete bill of exchange (c) Presentment notice of dishonour, and payment should be made by and to the executor or administrator in the same manner as by or to the deceased (d)

13 Executor's power to exercise a right of election Where a testator has a right of election it may be exercised on his death by his executor (e) e.g. an option to purchase the land demised (f) or a claim to an allotment of shares (g) but an option given by a testator to his son, it was held could not be exercised by the son's executor (h)

14 Where a discretion is given to executors Where a discretion is given to a certain person the general rule governing the exercise of that discretion is thus stated (i) If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion I am not aware of any principle or any authority upon which the Court should deprive the party of that discretionary power Commenting on this dictum it has been observed (j) that where a discretion is given to trustees the Court will interfere and see whether that discretion is properly exercised whether it is an honest and proper discretion Accordingly in *Mawji bhai v Muljibhai* (k) the Court refused to fix a limit to the expenditure to be incurred by trustees where it was left to their discretion and where it was not alleged that they had exercised their discretion improperly and dishonestly Whether any discretion is given at all and, if so its nature or extent is to be determined upon the construction of the will Thus by the words "You are to pay my share of the expenses whatever they may be" it has been held the testator did not intend to give the executors such an absolute discretion in the matter as might deprive the beneficiary under the will of any beneficial interest in the estate The Court might order an enquiry to determine what was the proper sum for such expenses (l)

As regards investments a trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate, so it is his duty to confine himself to the class of investments permitted by the trust and likewise to avoid all investments of that class which are attended with hazard The duty of guardians is primarily to preserve, not to add to the property of a minor (m)

- (a) *Walker* 191 *Halsbury v Maule*
2 J & W 243 *Bishop v Curtis*
18 Q B 849
(b) *More v Lloyd* 1 Exch 32
(c) *Seeley v Jackson* 34 L T 65
Re Duff's Estate L R 11 5
CI D 92
(d) *Walker* 191 *Byl's* 249 *reld* to
(e) *Murray v E. Co* 5 B & A
204
(f) *Lea v. and Kensington* 1 Esty
21 CI D 344
(g) *Jones v Buena &c* (1896) 1 CI
456

- (h) *Re Cousins* 30 Ch D 203 but
see Belsham v Rollins (1904) 1
1 R 284 W 427 12 Ed
(i) *Costabad v Costabad* 6 Hare
410 414
(j) *Re Hodges* 7 CI D 754 762
(k) 4 Bom L R 199
(l) *Nalairini v Nundo* 30 C 369
346 7 C W N 353 on app
32 I A 193 33 C 160 *Mullick*
to *Mullick* 1 Hare 245 *reld*
to
(m) *Re Cassumali* 30 B 591 8 Bom
L R 633

Where discretion is given to the executors in express terms they may exercise it according to their judgment. The onus of showing that it was an improper exercise of the authority is on the party alleging the fact. But an executor's discretion is not limited to the case where a specific discretion is vested in him by the will, he has a discretion incident to the office, but it is a very different discretion from a special discretion or authority. He is not to say "I will do whatever in my discretion I think fit", but the onus lies on him in such a case to show that things were in such state, that it was forced upon him to exercise a discretion one way or the other. In case of any difficulty it is better for him to apply to the Court for guidance (a).

15. Powers of executors under the wills of Hindus (i) *Prior to the Hindu Wills Act* The title of the executor is founded solely and simply on the will of the testator considered as an instrument of gift. The grant of probate confers no title upon him, in fact probate is not necessary. The powers of the executor are those of a manager (b). (ii) *On the passing of the Hindu Wills Act* The immediate effect of the Act was to place a Hindu executor who was in a position and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo Indian testator, in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased (c). Executors appointed by the particular class of Hindu wills contemplated by the above Act thus acquired the same estate and interest in the property of the deceased together with the same restrictions as to representing the estate in a Court of Justice as obtained by English law (d). (iii) *On the passing of Probate and Administration Act* The effect was considerably to curtail the powers of an executor or administrator in cases where the Act applied. S. 90 of the Act ran as follows —

"An executor or administrator has power with the consent of the Court by which the probate or letters of administration was or were granted to dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit

Provided that the Court may, when granting probate or letters of administration exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased

Both executor and administrator required the sanction of the Court in order to dispose of property of the deceased. A Hindu executor could transfer an estate to the Administrator General under Act II of 1874 s. 31 and this section had no application to estates vested in the Administrator General (e). (iv) *On passing of Act VI of 1889* S. 14 of this Act substituted what is virtually the present section in place of the above in the Probate and Administration Act. The operation of the

(a) *Garner v. Moore*, 3 Dr. 277, 283 4

(b) *Sharo Bibi v. Baldeo Das*, 1 B. L. R. O. C. 24

(c) *Adm. Genl. v. Prem Lal* 22 C. 788 on app. from 21 C. 732, *Tarakeswar v. Ambica*, 55 C. 892, 47 C. L.

J. 569
(d) *Shahk Moosa v. Shahk Essa* 8 B. 241 253 *Katreddi v. Kadyala* 49 M. 261 F. B.

(e) *Prem Lal v. Adm. Genl.* 22 788 1011, 23 C. 908

section was retrospective so it rendered voidable all invalid alienations that had been effected between 1881 and 1889 (a)

17 Sub section (2) It will be seen that the powers of an executor or administrator, if the deceased was a Hindu, *etc*, are not the same as those of one under English Law or under the Succession Act. This will be obvious on a comparison of the language of this sub section with that of sub section (1). The latter lays down the English rule (b). This sub section, which applies to Hindus *etc* restricts the power of the executor or administrator (c). Even where a person was entitled to a grant under the Succession Act but he actually obtained the letters under the Probate and Administration Act *held*, the letters must be regarded as being under the Probate and Administration Act giving powers that a grant under that Act could give (d).

The object of the section in placing these restrictions is to enable the Court to make an order for alienation of property only when the Court is satisfied that such alienation is necessary for the purpose of administration of the estate. This section has no application where the estate has been fully administered. An estate cannot be said not to be fully administered because it is charged with the payment of maintenance allowance to the administratrix (e). The Legislature did not deem it prudent to entrust to an executor or administrator in the moffussil the full powers conferred by the Succession Act (f).

18 Sub section (2) Clause (i) Unless there is any restriction imposed by the will the executor or executrix does not need the permission of the Court to dispose as he thinks fit of all or any of the property vested in him. Where there is no such restriction the Court has no power to intervene in the administration of an estate in the hands of an executor and an order sanctioning alienation is without jurisdiction (g). An Administrator General to whom an executor transfers by deed his interest in the estate is an executor for all purposes connected with the estate of the testator (h). The section in no way supersedes S 39 of the Transfer of Property Act. It simply gives the executor the ordinary powers of sale that an owner would have in so far as they are not limited by the will and as such those powers would be subject to the usual rules of equity (i). An executor has no power to convey an estate as executor after the estate has been wound up except that the shares of the legatees have not been made over to them (j).

- (a) *Rajani v Ramanath* 3 C W N 483
Pranath v Surja 19 C. 26 34
 (b) *Ma Selu v Chetty Firm* 3 Rang 443 450
 (c) *Ramdhon v Sharjuddin* 34 I C 128
 see N Chettyar Firm v Jan Ma 6 Rang 411 112 I C 261
 see Tawakkul Husain v Alodhya Bank 54 I C. 321
 (d) *Chettyar Firm v Tan Ma* 6 Rang 411,
 (e) *Re Nursing* 3 C. W. N. 635

- reled on in *Lakshmi v Nanda* 9 C L J 116
 (f) M 812 Speech of Sir W Stokes
 reld to
 (g) *Re Indra* 23 C 580. *Re Nundo* 23 C 908, *Mithibat v Meherbat* 23 Bom L R 858 64 I C. 397
 (h) *Re Nundo* 23 C 908
 (i) *Shri Beharilal v Bal Rajbat* 23 B 342
 (j) *Vestances v Robinson* 5 Rang 427

The executor is bound under this sub clause by the restriction imposed by the will unless released from the restriction in the manner stated in that clause (a). Restrictions may be imposed impliedly upon the powers of an executor to dispose of the immovable property of the testator (b) A direction by the testator that his estate should be managed by the Court of Wards does not by implication impose any restriction as the Court of Wards has full power of selling or disposing of the estate (c) A direction to sell or mortgage properties left by the testator does not impose any restriction on the executor's power (d), nor does a direction to executors to sell property in order to change the investment if desirable for the benefit of the trust property (e) Restrictions, which are void, on the enjoyment of property by legatees are to be rejected as having no operation (f) The principle has been extended to restrictions on powers of executors and administrators, so that where the restrictions are invalid the executors are free to alienate and an executor who is also a residuary legatee is not affected by restrictions imposed in the will (g). A Hindu widow appointed as executrix is competent to sell immovable property in the absence of any restriction on her power of disposing of the property and she will be deemed to have sold in her capacity as executrix (h) The executor of a will of a Muhammadan can validly sell and convey the testator's immovable property without taking out probate or obtaining the consent of all the heirs of the testator. Under S 211 the property of the testator vests in the executor and can be sold and conveyed by him under this section and no grant of probate is necessary (i)

Under this section an executor has power to dispose of the property for all purposes binding upon the estate and, even where the executor deals with the property for purposes not strictly binding on the estate, the alienations such as a sale or mortgage cannot be questioned so as to defeat the bona fide alienee who had no notice of the fact that the executor was using his powers for purposes not binding upon the estate. An alienee with notice of the fact that the executor was using it for his own purposes will not be protected (j)

19 Sub section (2) Cl. (ii) The object of the rule embodied in this clause is to enable the District Judge to see that the transfer applied for is necessary in the interest of the administration of the estate. Where the administration has ended, there being nothing to administer, an order made under this section is without jurisdiction it is the duty of the Court to undo that order so far as it

- (a) *The Eastern Mortgage v Reball*, 3 C. L. J. 260, *Azmunissa v Sirdar Ali* 29 Bom. L. R. 434, 120 J. C. 129
- (b) *Shri Behanlalji v Bal Rajbal* 23 B. 342.
- (c) *Re Indra*, 23 C. 580, 569
- (d) *Rajani v Ramanath* 3 C. W. N. 483
- (e) *Re Nando* 23 C. 908 (the property in its new form remains subject to the same trust as before)
- (f) *Ashutosh v Doorga*, 5 C. 438 P. C.

- (g) *Jagobandhu v Dwarika*, 23 C. 446.
- (h) *Mithubai v Meherbai*, 23 Bom. L. R. 858, 853-5, 64 I. C. 397 (sale presumed to have been made in the character of executrix in the absence of statement in deed)
- (i) *Mahomed v Hargorandas*, 47 B. 231; *Shemal v. Sheikh Ahmed*, 33 Bom. L. R. 1046
- (j) *Nambhermal v Veeraperumal* 59 M. L. J. 596; *Ganapati Sircamalai*, 36 M. 575

may lie in his power (a) An administrator must comply with the strict provisions of this section and the powers of an administratrix are the same as those of an administrator (b) He has no power to alienate without first obtaining the express permission of the Court and he is strictly bound by the terms in which the permission is given (c) A permission to sell does not confer a power to mortgage and such a transaction under such circumstances will be voidable The statutory provisions of the Probate and Administration Act apply to Muhammadan estates overriding any rules of Muhammadan law that are inconsistent with them An administrator is the only person clothed with authority to act as representative of the estate of the deceased and can bind the shares of the other heirs, and he cannot do so effectually unless he complies with the provisions of this section (d) An application by an administrator for permission to sell or mortgage will not be granted unless the alienation is necessary for the purposes of administration (e), and then after the fullest enquiry into such necessity (f) Even where a grant is made under S 221 to an administrator limited to certain specified properties, all the interest of the deceased in the properties vests in the administrator under S 179, and under S 191 letters of administration entitle the administrator to all the rights belonging to the intestate and under S 269 he has the power to dispose of the properties or any of them The administrator can not confer any title which the deceased had not (g) Where letters of administration were applied for under the Indian Succession Act to the estate of a deceased person who was described as a Confucian, but who turned out to be a Buddhist, *held*, the sale of immovable property by the administrator without the previous permission of Court was not thereby rendered invalid (h)

20 Permission to be applied for after grant Application for leave to sell by an administrator is to be made not along with the application for grant but after its completion (i) A mortgage by an administrator without the previous permission of the Court is voidable at the instance of a creditor of the deceased person (j)

21. Duty of court It is not desirable to grant permission to an administrator to sell immovable properties not in his possession to which third parties claim an absolute title, or which are subject to ostensible incumbrances, unless it is proved that other properties, not the subject of contention, are not available for sale Nor should permission be granted unless the Court is satisfied that the sale is necessary and in the interests of the estate as a whole (k)

22 Sub-sec (2) Cl (II b) Executors and administrators under English law may make an underlease of leasehold properties of the deceased within the

- (a) *Re Indrani* 130 I C 493
 (b) *Churl v Makhlada* 23 C W N 652, 52 I C 309
 (c) *Jalbal v Rewaram* 98 I C 6
 (d) *Ramdhon v Sharfuddin* 34 I C 128, see *N Clettyar Firm v Tan Mo*, 6 Rang 411, 112 I C 261
 (e) *Lakshmi v Nanda* 9 C. L. J. 116 *Haji Pu v Fin Tin* 2 Rang 117.

- (f) *Abou v Moolla* 49 I C 302 11 But L T 155
 (g) *De Silca v De Silca* 27 B 103 (see as to the title of the purchaser)
 (h) *Lee Lim v Saw Mah* 2 Rang 4
 (i) *Re Ram Lochun* 1 C. W. N. 111
 (j) *Laxmidas v Ismail* 28 Bom L.R. 1262, 99 I C 492
 (k) *Haji Pu v Tin Tin* 2 Rang 117, 80 I C 746

period of the original demise (a) but persons taking a lease from them must show that the act was for the benefit of those beneficially interested in the property (b) A lease with an option to purchase is void (c) An executor cannot renew lease holds in his own name (d) nor can he purchase the reversion expectant on the determination of a lease (e) A bequest of leaseholds to executors upon trusts to sell and to invest the proceeds for the benefit of persons, some of whom are infants will not enable them to grant an underlease and the Court of Chancery will not enforce performance of an agreement to take such underlease (f) A covenant against assignment contained in a lease is not broken by involuntary alienation upon death (g) Where there is an express provision restraining executors or administrators of the lessee from underletting (h) or assigning (i), the representatives being thus named in the covenant are bound by the condition but the restriction does not extend to them where they are not so named (j) Permission to sell does not authorise an administrator to effect a mortgage for an amount larger than the estimated value of the property without any necessity being shown for such a large sum being raised on mortgage (k) The power of an administrator under this clause is limited to a grant of a lease for a term of 5 years A lease for a term exceeding five years is good as between the lessor and the lessee but is voidable at the instance of any person interested in the property (l), though it is obligatory in case of such a lease to obtain the sanction of the Court (m) A permanent lease based on a consent decree is bad (n)

23 Sub-sec (2) Cl (iii) This section gives an administrator large but not unlimited powers of disposition and an alienation by him in excess of his powers without the leave of the Court is voidable (o) notwithstanding the restrictions imposed by the previous clauses and not void (p) It is however valid and binding on the parties to the transaction till it is avoided (q) So the holder of a money decree against the estate cannot avoid the mortgage if it was *bonafide* effected for the purposes of the estate unless he is prepared to

- (a) *Re Owen*, (1912) 1 Ch 519
- (b) *Oceanic & Co v Sutherland* 16 Ch D 236 see *Re North* (1909) 1 Ch 625
- (c) *Oceanic & Co v Sutherland* 16 Ch D 236 W 700 1 H XIV 299
- (d) *Keech v Sandford* Sel Ca Ch 61
- (e) *Phillips v Phillips* 29 Ch. D 673 *Bevan v Webb* (1905) 1 Ch 620
- (f) *Evans v Jackson* 8 Sim 217 W 564 12 Ed
- (g) *Parry v Herbert* Dyer 45 b *Doe v Bevan* 3 M & S 361 W 563 12 Ed
- (h) *Roe v Harrison* 2 T R 425
- (i) *Lloyd v Crisp* 5 Taunt 249 W 566 12 Ed
- (j) *Roe v Harrison* 2 T R 425, *Seers v Hind* 1 Ves. 294 See W 702-4 where the law is discussed
- (k) *Chandri Ayal v Abdul Karim* 51 B 16, 28 Bom L R 1360, 98 J C.

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- (l) *Shubhadra v Chandra* 8 C W N 54
- (m) *Sita Sundari v Barada* 28 C. W N 444
- (n) *Sarvesh v Hart* 14 C W N 451
- (o) *Nawab Akbari v Peara Saheb* 1 C. L. J 594 *The Eastern Mortgage & Co v Rebat* 3 C. L. J 260 *A Firm v Maung* 74 1 C. 54
- (p) *Jnanendra v Shorashi* 49 C. 626, *Sailaja v Rishie* 51 C. 135 145, 39 C. L. J 380 *Sita Sundari v Barada* 28 C W N 444, *Golab v Bahuria* 13 C. L. J 432 *Midnapore Zemindari v Ram* 91 1 C. 169 173
- (q) *Snaya v Munisami* 22 M. 289, *Tejpal v Ganga* 25 A. 59, *Shubhadra v Chandra* 8 C. W N 54 *The Eastern Mortgage v Rebat*, 3 C. L. J 260

make restitution to the mortgagee to the extent of the money advanced (a) It is voidable at the instance of any other person interested (b) and it can be set aside only on restoration of the benefit received to the persons from whom it has been received (c) A mortgage by a guardian is similarly voidable (d) Where an alienation, though unauthorised and therefore voidable, is consented to by the beneficiaries under the will they are estopped from questioning its effect to bind their interest in the estate (e) A right to recover property by setting aside an alienation may be lost where it would be inequitable to permit it under the circumstances of the case (f)

Where an executrix with the object of defeating the claim of the plaintiff for maintenance out of the estate alienated a large part of it and the purchaser was aware of the fraud, *held*, the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser irrespective of the possibility of her claim being satisfied from other property (g) A *bona fide* purchaser is free from such a claim (h) Ss 273 and 307 are not intended to afford protection to unwarrantable and fraudulent dispositions by an administrator whose title rests on a grant absolutely void S 297 affords protection to debtors making *bona fide* payments to a representative before revocation of the grant but does not protect purchasers (i)

Where an administrator is also the *kurta* of a family he cannot exercise those powers of a *kurta* which he is directly prevented from exercising as administrator, *eg* where he desires to sell the assets of the family to pay the family debts His powers are no more than those of any other administrator under the Act, therefore leave of Court is necessary in case of alienation by him (j) Certain persons who were heirs of a deceased lady took out administration to her estate limited to certain Government securities and sold them to a *bona fide* purchaser, *held*, they were bound to administer the fund as part of the assets of the estate (l) An alienation by a widow who takes out letters of administration with the permission of the Court is valid under this section, irrespective of the existence of legal necessity, because the alienation is made in the character of administrator and not of widow (l)

(a) *Zollhofer & Co v Chettyar Firm*, 9 Rang 34

(b) *Madnapore Zemindar v Ram* 91 I C 169 173, see *Bank of Bombay v Suleman* 33 B I P. C The alienation cannot be questioned by a stranger *Sailaja v Rihce* 51 C 135, 145, 39 C L J 340

(c) See *Sinaya v Munisami* 22 M 269 and other cases cited in *The Eastern Mortgage & Co v Reball* 3 C L J 260 cf S 64 Contract Act, S 35 Transfer of Property Act Ss 38 and 41 Specific Relief Act.

(d) Act VIII of 1870 Ss 29, 30

(e) *The Eastern Mortgage & Co v Reball* 3 C L J 260 *Charu v Kalitua*, 13 C L J 447

(f) *Sita v Barada* 28 C W N 441 *Charu v Kailash* 13 C L J 447

(g) *Shri Beharilal v Bai Rajbal* 23 B 342

(h) *Lakshman v Satjabhabanai* 2 B 494 *held* to in *Shri Beharilal v Bai Rajbal*, 23 B 342

(i) *Debendra v Adm Genl*, 35 I A 109 35 C. 955 on app from 33 C 713, 10 C. W N 673

(j) *Ranjit v Amulya* 9 C. W N 923, *Sharat v Raj* 15 B L R 350 (guardian) *held* to

(k) *Pronath v Surja* 19 C 26

(l) *Kamikhya v Haril*, 26 C. 607, *per contra*, *Vinayakrao v Vidyashankar* 9 Bom L R 404, see also *Tiku Ram v Dy Commr* 26 I A 97, 26 C. 707

The sanction by the Court must be a sanction of all the essential elements of the transaction including the payment and rate of interest in case of a mortgage (a) and on full disclosure of material facts (b). The terms of the permission must be strictly followed (c). There is nothing in the Probate and Administration Act which would justify a differentiation between the powers of a Hindu widow appointed as administratrix and any other administrator under the Act. The validity of a sanction granted by a District Judge cannot be challenged collaterally except perhaps where the order is challenged on the ground of fraud (d). Where a suit for administration is before a Court competent to entertain it and to order that accounts should be taken in the suit, no other Court would ordinarily have power to grant permission for the sale of property which forms part of the estate (e). Sanction obtained by fraud and misrepresentation of facts on an *ex parte* application is inoperative and no title passes to the purchaser or mortgagee in such a case (f). Where sanction has been given by a Probate Court, a creditor is not bound to enquire into the necessity of the advance (g). A sale by administrator without leave of Court may be avoided by means of a suit instituted for the purpose or by way of defence when an action is brought to enforce the transaction. A person seeking to avoid such a transaction is in the position of a person who seeks equity and he must, therefore, do equity (h).

A sale by an administrator without leave of Court is voidable and the right to set it aside may be barred within 3 years under Art 91 of the Limitation Act. Generally speaking the doctrine of *lis pendens* does not apply to an administration suit (i).

24 Sub section (3). The endorsement required by this sub section is not placed on grants issued to the Administrator General.

25 Any other person. These words mean any person interested in the property independently of the executor whose alienation is sought to be avoided. A creditor of the executor in his personal capacity not being a creditor of the estate of the testator is not entitled to avoid the alienation (j). But a creditor of the deceased is a person interested in the property and so can set aside an alienation made in contravention of sub sec (2) or sub sec (3) (l).

- (a) *Sailaja v Jadu*, 19 C W N 240, 245 21 C L J 88
 (b) *Jaibal v Rewaram* 98 I C 6
 (c) *Ramdhon v Sharfuddin* 34 I C 128, *The Eastern Mortgage &c v Reball* 3 C L J 260 cited above, *Charu v Kalidas*, 13 C L J 447
 (d) *Chunt v Makshada* 23 C W N 652, see *Mithibal v Mcherbal*, 23 Bom. L R 855
 (e) *Ma Chit v National Bank* 91 I C 432
 (f) *Mohesh v Ganpat* 23 C W. N 401, 51 I C 844 Bom. *Amrita*

- (g) *Annada v Atul* 23 C W N 1045
 (h) *Barada v Gajendra* 13 C W, N 557, 564 *The East in Mortgage &c v Reball* 3 C L J 260 relied on *Daljeendra v Monorama*, 49 C. 911, 70 I C 990, *Sita Sundari v Barada*, 28 C. W N 444 83 I C 319
 (i) *A Firm v Maung* 74 I C. 54, *Ma Kin v Ma Bwin*, 5 Rang 256 103 I C 264
 (j) *Jagabandhu v Danka* 23 C. 446.
 (k) *Laxmidas v Ismail*, 25 Bom L R 1252, 99 I C. 432.

26 Appeal An order by a District Judge under this section giving permission to an administrator to sell property has been held to be appealable (a)

27. Miscellaneous An executor cannot be given authority to adopt (b) A reversioner empowered to validate an alienation by a Hindu widow is not competent to delegate his power to his executor (c) Executors and administrators are not liable for breach of trust by reason only of continuing to hold an investment which has ceased to be an investment authorised by law (d) They can not lend on personal security (e) unless authorised by the testator Such authority does not extend to accommodation of a trader upon his bond (f) or to a loan to one of themselves (g) Executors or administrators may at their discretion, apply the income of property which they hold in trust for an infant either absolutely or contingently towards his or her maintenance education or benefit (h) but only where the infant is entitled to the interim interest or income of the subject of the legacy (i) When a suit for administration of an estate is pending in a court, no other court would ordinarily have the power to grant permission to sell a part of the property of the estate (j)

28 Lis pendens Where a creditor of a deceased person institutes an administration suit against an executor or administrator the mere institution of the suit or the obtaining of a mere administration decree does not deprive the executor or administrator of the general power to dispose of assets unless and until the plaintiff has obtained an order appointing a Receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in him The doctrine of *lis pendens* therefore does not apply to a sale made by him during the pendency of an administration suit (k)

308 (S 269 A. P 90 A.) An executor or administrator may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

(a) on such acts as may be necessary for the proper care or management of any property belonging to any estate administered by him, and

(b) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

(a) *Sarat v Benode* 20 C. W. N. 23
33 I. C. 143

(b) *Amila v Sunmoune* 27 C. 996
on app from 25 C. 663

(c) *Hajes v Haendra* 31 C. 693

(d) *Eland Medland* 41 C. D. 476

(e) *Walker v Symon's* 3 Sw 63

(f) *Langston v Oilcent Coop* 33 14 R.
R. 213

(g) *Langston v Walker* 5 Russ. 7
Sickney v Sewell 1 M. & Cr. 6

(h) *Re Smith* 42 C. D. 302, 44 & 45
Vict. c. 41 S. 43

(i) *Hill v Grant* 29 Ch. D. 331
Arnold v Burt (1895) 2 Ch.
577 *Walker* 196

(j) *Ma Chit v National Bank* 91 I.
C. 432 P. C.

(k) *Lee Lim v Saw Mah* 2 Rang. 4
29 I. C. 729 *A. R. Lim v*
Saung Thwe 74 I. C. 54

The section The section was introduced in the Acts of 1865 and 1881 by Act XVIII of 1919. Executors are bound to render accounts of their management of the estate. If they have squandered and misapplied any portion of the assets they must be held answerable as for wilful default (a). See Administrator General's Act (III of 1913).

Suits by executors The executors are the only persons who can sue the debtors and not the members of the family of the deceased. If the executors fail to do their duty a legatee may sue in due course of administration (b). Ordinarily one executor cannot sue another for recovery of assets but in equity an action lies against one at the instance of the other (c). On the death of all the other executors the surviving executor can sue to recover the assets from the deceased executors without making the persons beneficially entitled parties to the action (d).

Limitation So long as the executors are alive the legatees are not prejudiced by an executor not bringing a suit for recovery of assets (e). Where the debt is part of a legacy to a legatee the legatee has 12 years to bring the suit from the time when he becomes entitled to receive it (Art 123) (f). Limitation for recovery of sums due from a stranger debtor is governed by S. 9 and will begin to run during the lifetime of the testator. But in case of an executor debtor the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands (g). This is the case whether the executor proves the will or not (h). An executor who renounces is in the position of a stranger debtor and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt (i).

309 (S 269 B P 90 B) An executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator General by or under the Administrator General's Act, 1913.

The section The section was introduced in the Acts of 1865 and 1881 by Act XVIII of 1919. Compare Act V of 1902 S. 4 (3). The fees charged by the Administrator General is determined by rules framed under Act III of 1913 and these fees vary. Under that Act there are now Administrators General in Bengal, Bombay, Madras, Punjab, United Provinces, Burma and Assam.

- (a) *Salga v Salga* 10 C L J 503
31 C 247 (breach of trust by co executor) see *Lakshmi Chand v Jai Kumbhar* 29 B 170
(b) *Consell v Bell* 1 Y & C C C 569 579, *Morley v White* 8 Ch 731
(c) *W* 605 6 12 Ed
(d) *Peake v Ledger* 4 D G & Sm 137 see for form of decree
(e) *Re Pardoe*, (1906) 1 Ch 265

- (1906) 2 Ch 184
(f) *Rajamannar v Venkatakrishnayya* 25 M 361 12 M L J 183
Re Johnson 29 Ch D 964
(g) *Re Bourne* (1906) 1 Ch 697 cf S 87 Indian Trusts Act.
(h) *Wankford v Wankford* 1 Salk 299, *Re Applebee* (1891) 3 Ch 422 W 855
(i) *Ingle v Richards* 28 Beav

310 (S. 270 P. 91). If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of deceased's property

1 The section Cf S 88 Indian Trusts Act The section is based on the principle explained in *Cook v Collingridge* (a) 'One of the most firmly established rules is that persons dealing as trustees and executors must put their own interest entirely out of question and this is so difficult to do in a transaction in which they are dealing with themselves that the Court will not enquire whether it has been done or not, but at once say that such a transaction cannot stand Such a purchase is treated as a breach of trust without enquiry whether the transaction is beneficial or not (b), because in the majority of cases it is impossible to determine whether the trustee has made advantage or not (c)

Personal representatives cannot, without the sanction of the Court, sell to one of themselves either directly or indirectly (d) As a general rule an executor or administrator cannot be allowed either immediately or by means of a trustee to be a purchaser from himself of any part of the assets but is considered a trustee for the persons interested in the estate, and must account to the utmost extent of advantage made by him of the subject so purchased (e) An executor is bound to do everything in his power for the benefit of the estate, and is therefore absolutely precluded from buying the assets irrespective of undervalue or otherwise, because he may be thereby induced to neglect his duty" (f) A trustee under a will who had for a long time ceased to be a trustee can become a purchaser of trust property (g) An executor is estopped from repudiating the will and setting up an adverse title as against a beneficiary claiming under the will (h) An executor *de son tort* stands in the same position as an executor (i) An executor who has renounced may buy (j) The restrictions do not apply where an executor buys with the consent of parties (k) A sale cannot be impeached on the ground that at the time the purchaser might have proved the will where in fact he subsequently renounced probate (l)

2 Purchaser from legatee There is a well defined distinction between a purchase by a trustee from himself and a purchase by a trustee from a *cestui que*

- (a) Jac 607, 23 R R 155 See also *Wedderburn v Wedderburn* 4 My & C 41, *Willot v Blanford* 1 Hare 253, *Portlock v Gardner* 1 Hare 594, 603
- (b) *Decondoga v Decondoga* 4 A C. 692 703
- (c) *Ex p Lacey* 6 Ves 625
- (d) *Re Norrington* 13 Ch D 654
Re Harcey 58 L T 449
- (e) *Hill v Hallett* 1 Cox 134 *Blason v Toone* 6 Mad 153, *Re Norrington* 13 Ch D 654, *Baraja v Galenra* 13 C W N 557
- (f) W 567, 12 Ed *Re Boles* and

- British Land Co.*, (1902) 1 Ch 244
- (g) *Re Boles &c.*, (1912) 1 Ch 244 see *Henson v Esmell* 9 Bom L R 605 where it is laid down that these extreme views do not hold good in this country
- (h) *Muniam v Maruthammal* 34 M 211
- (i) *Gokuldas v Valbal* 15 Bom L R 343
- (j) *Makintosh v Barber* 1 Bing 30
- (k) *Blason v Toone* 6 Mad 153
- (l) *Clark v Clark* 9 A C 733

trust (a) The position is therefore somewhat different when an executor or administrator purchases the interest of a legatee. The executor stands in the position of a trustee and the legatee in the position of a *cestui que trust*. There is no rule of law which says that a trustee shall not buy a trust property from a *cestui que trust*, but if challenged the Court will examine into it (b). The Court will watch such transactions with the utmost jealousy (c). A trustee can buy from the beneficiary as if he has made the fullest disclosure to them of all material facts within his knowledge affecting or which might affect the value and condition of that estate (d).

As regards purchases of lands from a Hindu devisee the law is the same as under English law, i.e. creditors can follow the lands into the hands of a purchaser from the heir or devisee if it can be proved that the purchaser knew, (1) that there were debts of the ancestor or testator left unsatisfied, and also (2) that the heir or devisee to whom he paid the purchase money intended to apply it otherwise than in the payment of debts. A purchaser ignorant of either of these facts has a safe title, even where there is an express charge for debts by the testator on the devised estate for he is not bound to see to the application of the purchase money. When the devisee is also the executor the burden of proof is entirely on the creditor to shew that the executor intended to misapply the purchase money (e). "I think it is settled law that if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration who has no notice of the existence of unsatisfied debts of the testator or of any ground which renders it improper for the executor so to deal with the asset that persons purchase or mortgage is valid against any unsatisfied creditor of the testator (f). An assignment by a legatee to an executor is void (g). When the estate of a deceased person is under administration by Court or out of Court a purchaser from a residuary legatee or heir buys subject to any disposition which may have been made of the estate in due course of administration (h).

3 Application of the section The section has no application as stated above to the case of a purchase by an executor or administrator from one of the beneficiaries nor again to a case where a person named as executor may become the trustee of the property purchased by proving the will later on and assuming office at any rate where he has not employed his position in such a way as to

- (a) *Morse v Royal &c* 12 Ves 355
Barada v Gajendra 13 C W N 557
 (b) *Thomson v Eastwood* 2 A C 216 236 Such transactions have been disallowed in *Barton v Hassard* 3 Dr & W 461, *Dougan v Macpherson* 1902 A C 197 see *Barada v Gajendra* 13 C W N 557
 (c) *Coles v Trecothick* 9 Ves 249
Ex p Lacey 6 Ves 625
 (d) *Peary Mohan v Monohar* 43 I A 258 26 C W N 133
 (e) *Greender v Mackintosh* 4 C 897 906 7, *Corser v Cartwright*, L R

- 7 H L 731 see *Sooleman v Rohimlala* 6 Bom L R 800
Bank of Bombay v Suleman 33 B 1 P C *Pronath v Surja* 19 C 26 (purchaser not bound to see to the application of the purchase money)
 (f) *Graham v Drummond* (1896) 1 Ch 968 974 cited in *Bank of Bombay v Suleman* 33 B 1, 20 P C
 (g) *Vaughan v Heselline* 1 A 752
 (h) *Chatterput v Mahara* 32 C P C (sale by receiver in liquidation su t)

render it inequitable that the sale should be upheld (a) The obligation of an executor or administrator is a continuous obligation but the law does not favour the enforcement of stale demands (b) It should be remembered an executor or administrator is liable to account in respect of the dealings with the estate of his predecessor in office (c) An executor is not an express trustee for a legatee (d) A suit for an account cannot be treated as a suit for the purpose of following a trust property and S 10 of the Limitation Act has no application but Art 120 applies (e) An executor who is still acting as such cannot plead limitation against the claims of beneficiaries He is not protected like a trustee (f) but S 10 of the Limitation Act of 1877 applies In order to avoid a sale such as is contemplated by this section a suit need not be brought by the injured party it is sufficient for him to declare his purpose to rescind by way of defence when an action is brought to enforce the transaction (g)

4 Costs A successful party is not entitled to his costs out of the estate as a matter of course because there is *justa causa litigandi* (h) Costs are in the discretion of the Court and may in a suitable case be directed to be paid out of the estate (i) Where for example litigation is due to the testator's fault or of those interested in the residue, or there is good ground for questioning the execution of the will or the testator's capacity or good ground for allegations of fraud or undue influence the losing party may be spared from paying the costs Where however the opponents of the will believe in a state of things which if it did exist would have justified litigation but are unsuccessful in their opposition then each party should pay his costs (j)

5 Voidable A sale by a trustee in bankruptcy to one from whom he may directly or indirectly derive any benefit is liable to be set aside at the instance of parties interested (l) But a trustee can buy with the leave of Court (l) The words voidable etc imply that the Court will only set aside the sale in the interests of the beneficiaries or others e.g. creditors injuriously affected (m)

- (a) *Clark v Clark* 9 A C 733
 (b) *Barada v Gajenda* 13 C W N 557 11 C 289 (leading case See authorities discussed)
 (c) *Fartheby v Pale* 3 Atk 603
Brooking v Jennings 1 Mod 175
 (d) *Re Dacis* (1891) 3 Ch 119 see *Trimtak v Narayan* 33 B 429
 (e) *Saroda v Broja* 5 C 910
Hemangini v Nobin 8 C 788
Shapurji v Bhikaji 10 B 242
Ranga v Baba 20 M 393
Husro v Tarint 8 C 766
Nastani v Nanjalal 30 C 369 324
 (f) *Trimtak v Narayan* 33 B 429
 11 Bom L R 411 *Perfection v Curson* 21 B (H) Bhuathal
v Hal Raman 10 Bom L R

- 540 The executor must be shewn to be an express trustee in other cases *Re Dacis* (1891) 3 Ch 119 124 M 843
 (g) *The Eastern Mortgage v Reball* 3 C L J 260 *Clough v L. N. W. Ry Co* L R 7 Exch 46
 (h) *Barnick v McCullings* 2 Hagg Ecc 225 See *Nash v Yelloly* 3 Sw & Tr 59
 (i) *Mitchell v Gard* 3 Sw & Tr 275
 (j) *Dacis v Gregory* 3 P & D 28 *Pinsep v Sombre* 10 Moo P C 232
 (k) *Re Moore* 51 L J Ch 72
 (l) *Boswell v Cooks* 25 Ch D 307
 (m) *Hassanal v Gama* 11 9 Bom L R 656 623

311. (S 271 P. 92). When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

Powers of several executors or administrators exercisable by one

Illustrations.

- (i) One of several executors has power to release a debt due to the deceased
- (ii) One has power to surrender a lease
- (iii) One has power to sell the property of the deceased whether moveable or immoveable
- (iv) One has power to assent to a legacy
- (v) One has power to endorse a promissory note payable to the deceased
- (vi) The will appoints A, B, C and D to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor

1. The section The section is confined in its operation to cases where probate is compulsory before dealing with property (a) Where probate is compulsory this section empowers only persons who have proved the will or taken out administration to act on behalf of all the executors or administrators (b) But one executor can discharge the functions of his office where the others have renounced or have not proved the will. Thus a sale by an executor who has proved the will to one who has renounced if the transaction be not otherwise inequitable (c), or an exercise of a power of appointment of a new trustee by one executor under similar circumstances (d) or a mortgage (e) is good. On the death of one of several executors the power goes to the survivor or survivors (f), so also in case of administrators (g)

2 The rule The rule laid down in this section has been thus stated — 'Co executors however numerous are regarded in law as an individual person, and, by consequence the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all for they have all a joint and several authority over the whole property (h) There is no difference between executors and administrators in this respect (i) The word 'several' in the section does not mean 'possessing powers to act severally' (j)

- (a) *Chidambara v Krishnasami* 39 M 365
- (b) *Shaik Moosa v Shaik Esa* 8 B 241 (probate compulsory in case of wills that came within the Hindu Wills Act) *Satya v Motilal* 27 C. 683, *Chidambara v Krishnasami* 39 M 365 373, *Chandra v Satya* 29 I C. 139, *Hemangini v Sarat* 34 C L J 457
- (c) *MacIntosh v Barber* 1 B ng 50
- (d) *Ganville v M Nelke*, 7 Hare 156
Re Boucherett (1903) 1 Ch. 180

- (e) *Narajanamsami v Ramasami* 54 M L J 677 109 I C 47
- (f) *Flanders v Clarke* 3 Atk 509
- (g) *Hudson v Hudson* Cas temp Talb 127 W 596 12 Ed
- (h) W 708 *Owen v Owen* 1 Atk 494, Ex p *Rigby* 19 Ves. 463
- (i) *Jacobs v Harwood* 2 Ves Sen. 265 263, *Smith v Eccerell* 27 Beav 446
- (j) *Alamuri v Raghachacharyulu* 42 M L J 559, 67 I C 104

3 Direction to the contrary Where the will directs all the executors to act together, none of them can act singly, unless only one of them has obtained probate and the others have either renounced or refused to accept office for under S 216 it is the executor who has obtained probate that represents the testator. Those who renounce or refuse or are unable to act should be regarded as if they have never been appointed (a). The rule, it will be seen, is made subject to a direction to the contrary. The rule is made subject to the provisions of the will *e.g.*, where the testator requires everything to be done with the opinion of a majority of the executors, a minority by their acts cannot bind the estate (b). A direction in a will that there should be at least 6 executors acting at the same time does not amount to a direction to the contrary nor does it prevent one, who has proved the will, from exercising the powers of all (c).

4 Illustrations of the rule (In the absence of a direction to the contrary)

One of several executors may bind the rest (1) by a release of a debt (d),

(2) by a settlement of an account with a person accountable to the estate (e),

(3) by a grant of a receipt which will be a good discharge to the debtor (f)

(4) by acknowledgment of a debt thereby saving limitation (g),

(5) by assenting to a legacy (even his own) (h)

(6) by sale or gift of the goods of the deceased (i), but not where one executor erroneously believes to be acting with the authority of the other (j),

(7) by grant or surrender of a term (k)

(8) by an admission made in the character of an executor which will be binding against the estate (l) *e.g.*, which may amount to an acknowledgment under S 20 of the Limitation Act (m)

(9) notice of resumption of a grant of land given to one executor is good against all as they are joint occupants (n),

(10) by renewing a *hatchitta* and thereby making the estate liable (o),

(11) may perhaps compromise the claim of a co executor for the benefit of the estate (p) but not if its effect be to relieve himself from his own liability to the estate (q), or if it be otherwise fraudulent (r)

- (a) *Satya v Mollat* 27 C 693
 (b) *Era Dodda v Rama* 29 I C 505
 (c) *Hemangini v Sarat* 34 C L J 457, 461 66 I C 892
 (d) *Jacobs v Harwood* 2 Vek. Sen 265
 (e) *Smith v Eccerell*, 27 Beav 446
 (f) *Charlton v Durham* 4 Ch. 433 but see *Lee v Sankey* 15 Eq 204
 (g) *Re Macdonald* (1897) 2 Ch 181 but see *Arthur v Arthur* (1893) 2 Ch. 111
 (h) *Cole v Miles* 10 Hare 179
 (i) *Turner v Hardey* 9 M & W 770 *Cole v Miles* 10 Hare 179

- (j) *Sneesby v Thorne* 7 D G M & G 399
 (k) *Simpson v Gutteridge* 1 Madd 609, *Turner v Hardey* 9 M & W 770
 (l) *Simpson v Gutteridge* 1 Madd 609
 (m) *Chunder v Ramnarain* 8 W R 63
 (n) *S S for India v Vamanrao* 30 B 137
 (o) *Satya v Mollat* 27 C. 683
 (p) *Chidambara v Krishnasami* 39 M 363
 (q) *Scott v Lord* 8 Jur N S 249
 (r) *The Cordova v D Cordova* 4 A C. 692

(12) may release a debt (a) :

(13) by renewing a barred debt (b), but not against the wish of his co-executor (c),

(14) where some only of several executors have entered into a transaction without disclosing their character as executors they may sue in respect of such transaction without making the co executors parties (d)

5 Where an executor cannot exercise the power. (1) A power given to executors named, i.e., entrusted to particular individuals, cannot, as a rule, be exercised by the survivor or survivors, but that annexed to the office may be so exercised (e)

(2) One of several executors has power to release a debt due to the deceased when the debt subsists as a debt but not when it is merged in a decree in favour of all the decree holders. He may apply for execution for the benefit of all decree holders under O 21 r 15 (f), but he can not enter satisfaction in respect of the entire debt (g)

(3) None but an executor after grant of probate can prosecute a suit. Executors who have not proved the will and those beyond the local limits of the jurisdiction of the Court need not be joined in an action, otherwise all executors must be made parties as soon as probate has been granted, even if the suit be originally instituted against the heir before the grant of probate (h). If they do not all choose to join as plaintiffs those refusing may be added as *pro forma* defendants (i). Generally speaking one executor cannot sue or be sued by his co-executor, but a creditor nominated as executor who does not prove the will and does not act as executor has been allowed to sue the other executor (j)

(4) One of two executors cannot by an endorsement on a mortgage bond release a debtor who has borrowed from both of them from his liability under the bond, because this section applies to property which vests in the executors by virtue of their office (k). So also one of several executors borrowing money for goods supplied to the estate is personally liable for the debt (l)

(a) *Lachman v Chaturbuj*, 28 A 252

(b) *Alamuri v Venkata* 42 M L J 559 67 I C 104, *Jethibai v Putlibai* 14 Bom L. R. 1020, 17 I C 722 *fold*

(c) *Midgley v Midgley* (1893) 3 Ch 282

(d) *Braxington v Ault*, 2 Bing 177

(e) *Brassey v Chalmers* 4 D G M & G 528, *Crawford v Forshaw*, (1891) 2 Ch 261, *Re Smith*, (1904) 1 Ch 139, *Re Boucherett* (1908) 1 Ch 180 See *Farwell Powers*, 2 Ed 455 461

(f) *Lachman v Chaturbuj* 28 A 252 3 A. L. J 49

(g) *Tamman v Lachmin*, 26 A 318 see *Moluram v Hannu Prasad*, 26 A 334

(h) See O 31 r 2 C P C. *Shaik Moosa v Sheikh Essa* 8 B 241, *Hafezbai v Kazi* 19 B 83

(i) *Nazir Ahmad v Ragbat*, 53 I C 478, *Soudamini v Teniram* 54 I C 755, *Kumar Sardindu v Dhirendra* 2 C. L. J 484, *Sakil v Ram Kushun* 55 I C 504, *Hafiz Bai v Kazi* 19 B 83

(j) W 718, 719

(k) *Chandra v Satya* 29 I C 139

(l) *Debendra v Hem* 31 C 253, *Debendra v Radhika*, 8 C. W. N 135

(5) Receipt of one trustee (who was also an executor) is not sufficient to the agents for the money which they have received under the authority of two trustees but had paid over to the one who granted the receipt (a)

6 Several The word several does not mean possessing powers to act severally but refers to a case where there is more than one executor appointed by the will who have taken probate (b).

7 Illustration (VI) This illustration is an example of a contrary direction in the will. It illustrates the danger besetting a person as has been pointed out by Sir Whitley Stokes. In dealing with a single executor, unless he sees the probate and ascertains either that no other executors were appointed by the testator or that the will contains no such direction as that mentioned in the illustration.

8 Decree against estate Where there are several administrators a decree against one and against the estate as represented by that one is perfectly valid though the administrator might be liable to the legatees for breaches of duty and for gross negligence resulting in loss to the estate. The estate itself is bound by the decree (c). Before probate has been granted orders made against persons in possession of the property of the deceased may be binding upon the estate (d).

9 Miscellaneous Where one of two executors entered into an account with a banker in his own name for executorial purposes and the banker advanced money to him for the purposes of the will held the transaction was binding (e). The result would have been different if it was a purely personal contract. As has been said where executors join in a personal contract they are bound in the same way as other persons in whom the property is vested and though one may dispose of the assets so as to bind the others they cannot severally make a new contract so as to bind each other (f). An executor can do an act which will bind the estate but not a trustee (g). A trustee of an endowment may commit a breach of trust and still may be estopped as against a bona fide transferee for value without notice of the breach of trust, although the beneficiaries may not be estopped by the improper conduct of the trustee (h). Where before executors have obtained probate one intermeddles with the estate and makes preparation to dispose of a portion of it without the assent of the other the Court gave leave to the latter to issue a writ against the former for injunction and appointment of a Receiver (i). An executor dealing with property of the estate is presumed to have acted in that capacity although the fact does not appear on the document (j).

(a) *Lee v Sankey* 15 Eq 204
 (b) *Alamull v Venkata* 42 M L J 559 67 I C 104
 (c) *Grace v Pajmanatha* 26 I C 369 17 M L T 18
 (d) *Proturna v Kristo* 4 C 342.
Janakl v Dhanu 14 M 454
Chuni v Becty 33 C. 1044
Kumar Saradindu v Dillinda 2 C L J 454
Ch.J G Co v Thore 16 Ch.

D 151
 (f) *Turner v Hardey*) M & W 770
 773
 (g) *Ex p Rigby* 19 Ves 463
 (h) *Gulzar v Fida* 6 A. 24 101 in
Sidhu v Gopi 17 C L J 233
 18 I C 909 972.
 (i) *Re Moore* 13 P D 36
 (j) *Narajanamsi v Ramamsi* 54 M L J 677 109 I C 47

312 (S 272. P. 93). Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.

The section. The section 226 states that on the death of one of several executors, the entire representation of the estate of the testator accrues to the surviving executor or executors (a). So also in the case of death of one of several administrators (b). It is provided in the previous section that where there are several executors or administrators the powers of all may, in the absence of a direction to the contrary, be exercised by any of them who has proved the will or taken out administration. This section provides that on the death of one of several executors or administrators, the powers of the office, in the absence of any direction to the contrary, become vested in the survivor or survivors. As has been said the powers of the executors are not determined by the death of one, for the whole survives to the surviving executor who alone may continue to exercise them, for example, assent to a legacy (c).

In the absence, etc. The words 'in the absence of administration which occur in Section 93, of the Act of 1881 have been adopted in the clause as they appear to state the law more accurately (d). There is a difference in the language as used in this section and in the previous one. Here it is specified that the contrary direction must occur in the will, whereas it is not so specified in S 311, in which latter case, therefore, the contrary direction may be given by the Court in the probate. Where a testator expressly stated in his will that there must be two executors in the will stated above" and provided *inter alia* that A and B should be appointed executors, and in case of death of B, C should be appointed in his place, on B's death C applied to be substituted in his place, it was held, he was entitled to the grant (e).

All the powers of the office. The words 'of the office' indicate the nature of the powers that are vested in the survivor or survivors. The powers are those that are incidental to the office, i.e., are vested in the representative *qua* executor or administrator, i.e., by virtue of his office, i.e., not specially delegated in his personal or private capacity. Therefore it has to be distinguished whether a certain power is vested in the executors by law or by the testator in such a manner as to be attached to their office, in which case it will be vested in the survivor or survivors (f). Thus, where a right to perform certain religious ceremonies were conferred on the executors, it was held, the power was coupled with the office and on the death of one of them it passed to the surviving executors and not to the heir of the deceased (g).

(a) *Flanders v Clarke*, 3 Atk. 509
 (b) *Hudson v Hudson* Cas temp Talb 127, *Jacomb v Harwood*, 2 Ves Sen 265
 (c) *Flanders v Clarke*, 3 Atk 509
 (d) Notes on clause.

(e) *Hara v Doorgamoni*, 21 C. 195
 (f) *Amrilo v Sumomoye*, 24 C 589, 1 C. W. N 345, 358
 (g) *Barada v Gajendra*, 13 C. W N 557, 1 C. 289

313. (S 273. P. 94). The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

Powers of administrator of effects unadministered

Effects—As to the meaning of the word, see p 170.

Powers of administrator *de bonis non* An administrator *de bonis non* succeeds to all the legal rights of the former executor or administrator (a)

Powers of administrator during minority

314 (S. 274. P 95). An administrator during minority has all the powers of an ordinary administrator

Powers of an administrator during minority With regard to the powers of an administrator during minority Jessel M R observes, 'The limit to his administration is no doubt the minority of the person but there is no other limit He is an ordinary administrator, he is appointed for the very purpose of getting in the estate, paying debts, and selling the estate in the usual way, and the property vests in him' (b)

315. (S. 275 P. 96) When a grant of probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator.

Powers of married executrix or administratrix

The section Under the Succession Act of 1865, though not under the Probate and Administration Act of 1881, consent of the husband was necessary for a grant of probate or letters of administration to a married woman The restriction prevailing in respect of cases governed by the Succession Act of 1865 was introduced in the present Act under Ss 223 and 236 but removed by Act XVIII of 1927. That amendment has rendered the present section superfluous In England it was not till the passing of the Married Women's Property Act 1907 (7 Edw VII c 18) that married women came to enjoy the wide powers conferred on them by this Act O 31 r 3 C P O provides that 'the husband of a married trustee administratrix or executrix shall not as such be a party to a suit by or against her An alienation by a Hindu widow who obtained letters of administration has been held good irrespective of the existence of legal necessity i.e., the disabilities under Hindu law incidental to her sex were removed by the grant of administration (c)

(a) *Catherwood v Chakaud* 1 B & C 150
(b) *Re Cope* 16 Ch. D 49 see W

349 12 Ed and also Ss. 244 245 246.
(c) *Kamikhya v Har* 21 C 607

CHAPTER VII

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR

316. (S. 276. P. 97). It is the duty of an executor to provide funds for the performance of the funeral necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

1. **Change.** In the Act of 1885 it was provided that it was "the duty of an executor to perform the funeral of the deceased," but in this Act 'The wording of section 97, of the Act of 1881 has been followed as it is more suitable to the wider scope of the consolidated Bill and involves no change of substance'.—*Notes on Clauses*

2. **To provide funds** An executor with assets is liable to pay the funeral expenses of the testator even in the absence of an express contract (a) Even if the executor never receives assets to the amount of the funeral expenses, he is liable to pay, although he did not order the funeral It is part of his official duty to bury the deceased and the funeral expenses are clearly executorship expenses (b), (as to the meaning of the term see S 320 Note). 'The furnishing of mourning to the widow or family is not a funeral expense which can be claimed against the estate' (c) If the funeral be ordered by another person to whom credit is given the executor is not liable (d) Where however the executor adopts or ratifies the order of a third party he is liable (e) An undertaker is entitled to a grant of letters of administration as a creditor for his unpaid charges (f) In *Isarmal v Nichomal* (g), the plaintiff after taking out a succession certificate in respect of the debt sued a legatee under a will for recovery of a certain sum deposited by the testator with the defendant The defendant set up an oral will directing him to spend the money on funeral expenses and in charity Both wills were held not proved The defendant was held bound to pay the amount to the plaintiff as the certificate holder less the sum spent on funeral expenses Expenses of a tombstone may be paid by an executor out of the assets if there be a direction by the testator to erect one (h), but not otherwise (i)

3. **Funeral of the deceased** There can be no property in the dead body of a human being (j) *Prima facie* the executors are entitled to possession and are

- (a) *Sharp v Lush*, 10 Ch D 468
472, *Ambrose v Kerrison* 10 C B 779, *Rogers v Price*, 3 Y & J 28, but in *Camani v Adm Genl* 29 M 290, the funeral expenses were in the circumstances of the case directed to be paid out of the specific legacy
(b) *Sharp v Lush*, 10 Ch. D 468
(c) *Johnson v Baker*, 2 C. & P. 207, H. XIV 240
(d) *Brice v. Wilson*, 8 Ad & EL

- 349 n. (c)
(e) *Green v Salmon*, 8 Ad & EL 348, see *Coleby v Coleby*, 12 Jur N S 496
(f) *Newcome v Beloe*, 1 P & D 314, *Re Fowler*, 16 Jur 894
(g) 131 I C 192
(h) *Re Dean*, 41 Ch D 552, 557.
(i) *Bridge v Brown*, 2 Y. & C. C. 181.
(j) *Reg v Sharpe*, Dea & Bell C. C. 160

responsible for its burial (a) For the same reason a man cannot by will dispose of his dead body A direction to make it over to an individual other than the executor is consequently void (b) The change in the wording of the section has perhaps effected a change in the law and an executor can no longer claim possession of the body of the deceased In England burial is the usual rule but cremation is not illegal (c)

4 **Suitable to his condition** No hard and fast rule can be laid down as to the exact amount to be allowed as funeral charges Expenses vary in different places and at different times They are also to be regulated to a certain extent according to the degree and station in life of the deceased and of the value of the estate left by him (d) In case of a person dying insolvent the executor will be allowed no more for the funeral than is necessary or reasonable having regard to the degree and condition of the deceased person (e)

317. (S 277 P 98). (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of

(2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code

- (a) *Reg v Fox* 2 Q B 246
 (b) *Williams v Williams* 20 Ch D 659
 (c) *R v Price* 12 Q B D 247
 but see Re Dixon 1892 P D 388 393
 (d) *Lowe J v Lowe J* 2 Cr & M 612
 see Stockpole v Stockpole

- 4 Dow 209 *Mullick v Mullick*
 1 Knapp 245 *See W* 1395
 11 Ed
 (e) *Slag v Punter* 1 Salk 296; 3
 Atk 119 Hancock v Infimare
 B & Ad 265 Bisset v Anindus
 4 Sm 512 *W* 611 *f n* 12 Ed

1. **Change.** The present section was inserted by Act VI of 1889 S 15 in the Acts of 1865 and 1881. The original section ran as follows: An executor or administrator shall, within six months from the grant of probate or letters of administration, exhibit in the Court by which the same has or have been granted an inventory containing a full and true estimate of all the property in possession and all the credits and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character and shall in like manner, within one year from the date aforesaid, exhibit an account of the estate, showing the assets that have come to his hands and the manner in which they have been applied or disposed of

2. **Liability for accounts.** The old English law was very strict as to the furnishing of accounts by executors and administrators of the property of the deceased that came to their possession (a). Now a days they need not furnish any account unless cited for the purpose by a party having an interest (b) or having an appearance of interest or even a probable or contingent interest (c). According to English law the right to call for an inventory and account is not lost by lapse of time but reason and justice have set certain limits (d). Apart from S 150 C.P.C. this section imposes on the grantee the duty of furnishing the inventory to the Court which issued the probate. The jurisdiction of the Court is not taken away because the properties dealt with in the probate are within the jurisdiction of another Court by reason of the bifurcation of the district (e).

'The parties who may be cited to exhibit the inventory and account are not confined to the personal representative himself, or even to those who, upon the death of the personal representative, succeed to the representation of the original testator or intestate', but the representative of a deceased administrator with the will annexed or an administrator *pendente lite* or *durante minoritate*, or an attorney who takes administration in the name of another, may be compelled to render inventory and account (f). Executors not liable to account under will are not exempt from the obligation of exhibiting the account of the estate as required by this section (g).

3. **One inventory and one account to be filed.** This section requires a representative to file an inventory of the property within six months or within such further time as the court may allow and then to file an account. This account is to be filed within one year, for that is the time allowed to the executor to fully inform himself of the testator's property, but the Court may, in a suitable case, extend the period for filing the account. What the section makes quite clear is that there should be one initial inventory and one final account after the completion

(a) 21 Hen VIII c. 5 and 22 & 23 Car II c. 10 S 1

(b) W 733 Phillips v Bignell, 1 Phill 239

(c) Phillips v Bignell, 1 Phill 239. Gale v. Luttrell, 2 Add 234. Jehangir v Baji Kulkarni, 27 B 231

(d) Bowles v Harcey 4 Hagg 241, Burgess v Maniott 3 Curt. 424

(e) Subramaniam v Ramaswami 31 I C 499

(f) W 616-17 12 Ed See cases referred to

(g) Pearl v Bepin, 45 I C 336

of the administration (a) The words 'may from time to time appoint' have been construed to refer to the extension of the period within which an inventory or an account has to be exhibited and not to authorise the Court to go on again and again calling on executors to furnish an inventory or an account (b). The section therefore contemplates only one initial inventory and one final account after the completion of the administration (c), even when time is extended (d) An order directing an executor to furnish accounts annually is clearly not in accordance with the provisions of this section (e) and a direction in the will to file accounts annually in Court does not enlarge the Judge's power (f) A provision in a will exempting an executor from the liability to furnish account does not free him from the obligation imposed by this section (g)

4 Who may call for an account. An executor who has not proved the will can call upon his co executor who has taken probate to file the inventory and account (h) A legatee or a person interested in administration has the right to inspect the account and if he is not satisfied with it he may file an administration suit and ask for administration by Court (i) It is the right of every person who is interested in the estate of a deceased person to see that the accounts are proper and he can compel the executor to file the account, and the executor will bear the costs of the order, but this right is not to be exercised in a frivolous or vexatious manner. An executor is not justified in declining to file his accounts simply because there may be a dispute as to the period from which the account is to begin (j) Under S 19 H of the Court Fees Act the collector has power in certain cases to enquire into the accounts of an executor or administrator and take proceedings in connection therewith (k) As to whether an application lies for an order on the executor to file his inventory and account, see *Moolla v Moolla* (l) In England "neither an executor nor an administrator can be cited by the Probate Division *ex officio* to account" (m)

5 Contents of Inventory. It should contain 'a full true and perfect description and estimate and all the chattels, real and personal in possession and action, to which the executor or administrator is entitled in that character. The goods may be appraised by any honest person in the neighbourhood' Its contents

- (a) *Mohesh v Biswanath* 25 C 250, 1 C. W. N 646, *Hemandas v Chellaram*, 32 I C 554, *Chandra v Prasanna* 45 C 1051, 64 I C 997, *Sarat v Uma* 31 C. 628 8 C. W. N 578, *Bal Panibai v Moraji*, 29 Bom L R 683 24.
 (b) *Mohesh v Biswanath* 25 C. 250, 1 C W. N 646
 (c) *Hemandas v Chellaram* 32 I C. 554, *Mohesh v Biswanath* 25 C 250
 (d) *Chandra v Prasanna*, 45 C. 1051, 64 I C 997
 (e) *Jagat v Indu* 44 I C. 58
 (f) *Sarat v Uma* 31 C 628 8 C. W. N. 578

- (g) *Pearilal v Beplin* 45 I C 336, *Mohamed v Sabida*, 23 C. W. N 658
 (h) *Jehangir v. Bal Kajibai*, 27 B 281
 (i) *Hemandas v Chellaram*, 32 I C 554, see *Ollley v Gilby* 14 L J Ch 177, *Low v Boucette*, (1891) 3 Ch 82, *Bal Panibai v Moraji* 29 Bom L R 683 106 I C. 24
 (j) *Re Jettha*, 7 Bom L R. 451
 (k) *Bhubaneswari v Collector &c* 41 C. 556 18 C. W. N 153 P C
 (l) 35 I C 950
 (m) *Bal Panibai v Moraji* 29 Bom L R 683 106 I C 24

shall not be a mere "list without a single figure and containing nothing in the nature of a full and true estimate of the property in possession" (a). This section does not mean that the representative may tender any paper he pleases and by styling them a full and true inventory or an account of the estate he complies with the requirements of the section (b).

6. Property in possession. It should contain all that the deceased left at the time of his death. The Court is not to call for an account of the subsequent profits in his business (c). The debts which can be recovered should be distinguished from those which are doubtful (d). The inventory as set forth in the Court Fees Amendment Act (XI of 1899 s. 19H Sched III) includes for the purpose of valuation, the rents and profits that accrued due "since the date of the death of the said deceased." A reference to the Schedule also makes it clear that the expression 'property in possession' does not include property in expectancy or in action.

7. Assets. This term means and includes "property of a deceased chargeable with and applicable to the payment of his debts and legacies" (e). It has been pointed out (f) that the word 'property' in S. 50, C. P. C. is not used as identical with assets which latter term includes mere right of action. Under that section, therefore, a representative of a deceased judgment debtor, who has failed purposely or negligently to recover some debt due to the estate of the deceased, is not liable in the same way as for property of the deceased which has come to his hands. Assets include properties purchased out of funds belonging to the estate, i. e., properties into which assets are converted belong to the estate (g).

8 Liability qua executor or administrator. This section deals with the liability of an executor or administrator as such only (h). Thus if he be also appointed as shebait, he is liable to account as executor only, with his management as shebait and the accounts of such management the Court has no concern (i). The duties of an executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee, the executor as such has no authority to manage the estate on his behalf (j). So long as the person entitled to the estate has not taken it out of the possession of the executors, they are entitled to continue in occupation of the estate (k). It is not always easy to determine when an executor dismisses the character of executor and becomes a trustee. Generally speaking, it is when the

(a) *Bhubaneswar v. Collector &c.*, 40 I. A. 236, 41 C. 556.

(b) *Saraf v. Uma*, 31 C. 628, 8 C. W. N. 578.

(c) *Pitt v. Woodham*, 1 Hagg. 247.

(d) *W.* 738, 11 Ed.

(e) *Omita v. Adm. Genl.*, 25 C. 54, 1 C. W. N. 500; *Re Courton*, 25 C. 65; *Watkins v. Saraf*, 31 C. 572, 582 3.

(f) *Khushroo v. Hormazda*, 11 B. 727.

(g) *Ganoda v. Nalini*, 36 C. 28.

(h) *Mohamed v. Sabida*, 23 C. W. N. 658, 49 I. C. 128.

(i) *Pearlal v. Bepin*, 45 I. C. 336.

(j) *Taran v. Ramratan*, 31 C. 89, 92-3; *Sankar v. Biddulata*, 23 C. L. J. 271; *Chandra v. Prasanna*, 48 C. 1051, 64 I. C. 997.

(k) *Bombay &c. v. Smith*, 21 I. A. 139, 19 B. 1; *Chandra v. Prasanna*, 43 C. 1051, 64 I. C. 997.

funeral and testamentary expenses and debts are discharged the legacies paid and sums set apart for investment in the trust created by the will (a)

This section contemplates orders directing a representative merely to exhibit his accounts in Court and does not authorise it to give directions regarding trusts created by the will of the testator or to provide for their administration (b) But the rendering of an account by an executor does not exonerate him from liability to render accounts of his management of the property of the co sharers of which he is in possession as trustee (c) An executor may be called upon to account not only for the period of his executorship but also for the period during which the estate was in charge of his predecessor in office who may be and ought to be called upon to account by the executor or other person who succeeds him in the administration (d)

So far as an executor or administrator is concerned his liability to account is a continuous one and the person who is entitled to call for an account has the right to demand an account at every moment of the time during which the administrator acts as such and so long as the administration is not complete In this view a claim for an account pure and simple will be barred by limitation after six years under Art 120 It is a well settled rule that if a person entitled to an accounting delays for a great length of time his right may be barred by the presumption that the estate has been fully administered or by the rule of equity which discounts ances stale claims (e)

It is duty of an executor to file his accounts without compelling the party interested in the estate to take out an order compelling him to do so (f) An executor or administrator continues to be liable to account to the beneficiaries even after the passing of the accounts filed by him The discharge of an executor or administrator therefore is no bar to a suit for an account by the beneficiaries (g) An application for filing of inventory and account 30 years after grant of probate without any cause being shown was rejected as being of the nature of an abuse of the process of the Court (h) It is the first duty of an accounting party whether an agent or trustee or receiver or an executor (for in this respect they all stand in the same position) to be constantly ready with his accounts (i) An order of the Probate Court for the production of the amount in the hands of an executor for the purpose of investment is wholly unauthorised and a fine imposed in consequence of non compliance is equally unauthorised (j)

- (a) *Tilmbak v Narayan* 33 B 429
433 3 I C 164
(b) *Nafandas v Ashimbal* 47 I C 750
(c) *Mohamed v Sahida* 23 C. W. N 648 4 I C 128
(d) *Fotherby v Pale* 3 Atk 603
Basuda v Gajendra 13 C. W. N 557 1 I C 253
(e) *Baroda v Gajendra* 9 C. L. J 281 1 I C 289

- (f) *Re Jetha* 7 Bom. L. R 451
Moolia v Moolia 35 I C. 950
(g) *Ex p Amerchand* 29 B 189
See below
(h) *Moolia v Moolia* 35 I C. 950
(i) *Prasse v Green* 1 Jac & W 149;
Ganenda v Upenda 4 B. L. R. O. C. 103 M 842
(j) *Khetler v Saromani* 12 C. L. J 602

The Court has no power to appoint an auditor for verifying the entries in the accounts and inventories. The proceedings under this section are intended to be of a summary character and the Court should not embark upon any detailed or minute enquiry as to the correctness or otherwise of the said accounts and inventories (a).

An executor or administrator who fails to file an inventory or to produce an account as directed by this section incurs liability. In the first instance, the grant is liable to be revoked under S 263. Secondly, sub section (4) makes the exhibition of an intentionally false inventory or an account an offence under S 193 of the Indian Penal Code, while sub sec (3) shows that intentional omission to comply with a requisition by the Court to exhibit an inventory or account amounts to an offence under S 176 of the Indian Penal Code. Lastly, an executor is also liable for *devas tatist* under Ss 368 and 369 (b).

9 Duty of the Court. The court is not bound to go into the correctness of an account filed under this section or scrutinize and audit the papers, its sole duty is to satisfy itself that the account as filed *prima facie* satisfies the requirements of this section (c). If however the account contains manifest mistakes and omissions, the representative may be called upon to furnish an amended account and time may be granted for the purpose but not where accounts already filed have been accepted as *prima facie* correct (d). Where an inventory is challenged on the ground of being untrue in material particulars, the errors which vitiate it should be precisely and specifically pointed out (e). It is the Court which granted the probate that should receive the inventory (f).

If an executor improperly and without sufficient reason fails to file the accounts he will have to bear the costs of the order compelling him to do so, but the party interested will bear his own costs if his application be frivolous or if he be guilty of long delay, or laches, or if he has acquiesced in the executor not filing the accounts (g). A trustee is bound to furnish to the *cestui que trust* proper information as to the state of the trust estate (h). A legatee has a clear right to have a satisfactory explanation of the state of the testator's assets and an inspection of the accounts (i). His right is similar to that of a *cestui que trust*. In case of gross neglect or wholly indefensible refusal by trustees and executors in furnishing accounts they must pay the costs of litigation occasioned by their neglect or refusal (j).

- (a) *Chheda Lal v. Ram Dulari* 127 I. C. 24. See *Bal Pantbal v. Morarji* 29 Bom. L. R. 653, 106 I. C. 24 (see as to practice in Bombay High Court). *Hemandas v. Chellaram*, 32 I. C. 554 (a legatee or a person interested in administration has a right to inspect the accounts of the executors and if inspection be denied, to file an administration suit and ask for administration by the Court). *Pantbal v. Morarji*, 29 Bom. L. R. 653, 10 I. C. 24 (not by an officer of the Court).
- (b) *Ahler v. Saromoni* 12 C. L. J. 602.
- (c) *Sarat v. Uma*, 31 C. 624, 8 C.

- W. N. 578, *reid* to in *Pantbal v. Morarji* 106 I. C. 24. *Hemandas v. Chellaram* 32 I. C. 554.
- (d) *Sarat v. Uma*, 31 C. 624, 8 C. W. N. 578. *Pant Bal v. Morarji*, 29 Bom. L. R. 653 (they are to be regarded as final).
- (e) *Chandra v. Prasanna*, 64 I. C. 977, 43 C. 1051.
- (f) *Satraman v. Ramaswami*, 31 I. C. 479.
- (g) *Re Jehe* 7 Bom. L. R. 451.
- (h) *Re Trust* (1892) 1 Ch. 86. *Law v. Buxera* (1871) 3 Ch. 82.
- (i) *O'ay v. Gaby* 8 Beav. 672.
- (j) *Re Salmer* (1904) 1 Ch. 207.

The mere fact that accounts have been filed in the Probate Court or even the fact that the accounts have been passed by the Court does not absolve an administrator from liability for sums misappropriated by him. But a charge for criminal breach of trust cannot be maintained without the sanction of the Court which appointed him administrator (a). The protection afforded to parties interested is that if the inventory and accounts are intentionally false in any particular, the executor or administrator makes himself liable to punishment under the Indian Penal Code (b).

10 Sub-sec. (3) An order under this sub-section giving sanction to prosecute should not be made without an enquiry whether the omission to produce the account was intentional nor an order made under sub-sec (4) without the Court being satisfied that the account filed was intentionally false (c).

11. Revocation of probate The Court is not bound to revoke a probate under S 263 if an inventory be untrue in a material respect, but has a discretion in the matter. The value of large assets left by a testator is a matter of conjecture and perfect accuracy can hardly be expected (d).

12 Assets that have come to his hands The inventory delivered by the executor on proving the will is not, in itself, evidence of assets coming to his hands, and is not sufficient to affect him with liability as an executor having had possession of the property. An executor before proving the will is not bound to go any distant place, where the effects of the testator may be, in order to ascertain their real value, it is sufficient if he acts on information obtained by him (e). Accordingly the value of the property set forth in the inventory (f), or in the will (g), is not conclusive evidence of the same (h).

318. (S. 277 A. P. 99). In all cases where a grant has been made of probate or letters of administration intended to have effect throughout the whole of British India, the executor or administrator shall include in the inventory of the effects of the deceased all his moveable and immoveable property situate in British India, and the value of such property situate in each province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

Inventory to include property in any part of British India in certain cases.

- (a) *Krishna v Emperor*, 33 C L J 252, 60 I C 791. *Kishinsh v Beeky*, 39 C. 587, 14 I C. 4 fold. *Sanjak v Emperor*, 45 C 432, 46 I C. 836 *reid* to
(b) *Bai Panibai v Morarji*, 29 Bom L. R. 683, 106 I C. 24
(c) *Naba v Telpura*, 2 C. W. N 597; see *Khetler v Saromoni*, 12

- C L J 602
(d) *Maddali v Velampalli*, 34 I C. 435
(e) *Stearn v Mills*, 4 B & Ad 637
(f) *Aga Mahomed v Meerza Ally*, 4 W R P. C. 106
(g) *Lakshman v Ram*, 1 B 561 add in 7 I A 181, 5 B 49
(h) M 844

319. (S. 278. P. 100). The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

As to property of, and debts owing to deceased

1 The section An executor or administrator, like a trustee must take care of the property of the deceased as if it was his own (a) He is not to mix his own money with the testator's (b)

2 To collect. It is the duty of an executor or administrator to get in the testator's money as quickly as possible (c), even property specifically bequeathed (d) Money in the hands of a co-executor should be similarly collected (e) To collect does not mean to convert the testator's property or all available assets into money The duty of the representative is to liquidate the assets, i.e., reduce it into possession cleared of debts and other immediate outgoings and so left free for enjoyment by the heirs (f) A person having a life interest in the residuum has a right to call on the trustees or executors to convert into money all personal property of a perishable or speculative character, everything in short, not consisting of proper securities for money, so that it may be properly invested, unless the testator has directed that a particular item of his property is not to be sold (g)

3 Liability for failure to collect Where it is the duty of a trustee or executor to obtain payment of a sum of money, the trustee or executor is exonerated and never required to make good the loss, if he has done all he can to obtain payment, but his efforts have not proved successful Nay more, if he has taken no steps at all to obtain payment, but it appears, that if he had done so they would have been, or there is reasonable ground for believing that they would have been, ineffectual, then he is exonerated from liability (h) The burden of proving reasonable grounds of belief is on the executors (i) Where in spite of an application to him by persons interested in the estate he refused to do so, and the fund was lost, the executor was held personally liable for the loss and for the cost of legal proceedings (j)

4. Liability in case of mortgages In case of mortgages created by the testator it is no part of the duty of executors, authorised to make such investments, to realise mortgage securities of their testator not wanted for the purpose of administration, and executors and trustees will not be liable to make good the loss if they acted with reasonable care, prudence and circumspection (k) Where a

(a) *Massey v Banner* 1 J & W. 241.
see *Re Whiteley*, 33 Ch D 457

(b) *Wilks v Groom*, 25 L J Ch 724

(c) *Caney v Bond*, 6 Beav 486

(d) *Perry v Meddowcroft*, 4 Beav. 197, 204

(e) *Stiles v Guy*, 16 Sim. 230

(f) *Hiddings v Denysen*, 12 A. C. 624

(g) *Wright v Lord*, 6 H L C.

217 (see form of enquiry where executor delays in selling and investing)

(h) *East v East*, 6 Hare 343 relied on in *Clack v Holland* 19 Beav 262, 271

(i) *Re Brogden* 33 Ch. D 546

(j) *Caney v Bond*, 6 Beav 486.

(k) *Re Chapman*, (1896) 2 Ch. 624
(duties of executors re mortgage debts discussed)

certain sum was invested in mortgage by the executors and they did not take steps to recover the principal and interest in spite of notice of embarrassed condition of the mortgagor, they were held personally liable for the amount (a). The retention of a mortgage for more than $2/3$ rd's of the value of the property mortgaged is not necessarily a breach of trust (b).

5. Liability in case of other investments. The same principle would apply in case of other investments. Where the loss arises out of a particular mode of investment directed by the testator, the executors are not liable, because they are under no obligation to change the investment (c). For losses arising out of delay in the sale of Crystal Palace shares, which were at a premium at the testator's death, the executors were held liable (d). The ordinary rule is that perishing or diminishing property, like a mine, in the absence of a direction to the contrary by the testator (e), should be sold and the produce invested in consols. Profits accruing before sale form part of the assets (f).

6. Liability for loss by banker. Executors, in the absence of any direction by the testator as to investment, are not liable for loss of money kept in a bank of good repute or where the amount was not unreasonable (g). The executors are no doubt bound to exercise their judgment on the safety of the place of deposit (h). The satisfied legatees are not liable to contribute in such a case (i). Where, however, there is an express direction to invest the surplus, the executor is liable whether the money is left with bankers (j), or a stranger (k), or misappropriated (l). An executor is also liable for omission of a banker to make the investment if he does not see that the investment is made (m).

7. Liability for loans on personal security. The law has been thus stated: "In the absence of express authority the representatives ought not to lend on personal security (n) though given by several persons (o). Even where there is authority to lend on personal security, representatives ought not to lend to one of themselves (p). Where a debt due from a legatee was to be deducted from a settled legacy to the testator's wife any loss which eventually arose in respect of the debt would fall upon the legacy (q).

8. Liability of debtor or creditor appointed as representative. The appointment by the creditor of his debtor as executor operates as a release at law of the debt, but not in equity, unless there be an intention to make an

- (a) *Dhupall v. Andoor*, 33 I. C. 604.
 (b) *Re Medland*, 41 Ch. D. 476, 481, *reid.* to in *Re Chapman*, (1895) 2 Ch. 763, 774.
 (c) *Dhupall v. Andoor*, 33 I. C. 604.
 (d) *Hughes v. Simpson*, 22 Beav. 181; *Whightwick v. Lord*, 6 H. L. C. 217.
 (e) *Gray v. Siggers*, 15 Ch. D. 74; *see Re Pk'atin*, (1896) 2 Ch. 199.
 (f) *Whightwick v. Lord*, 6 H. L. C. 217, 234.
 (g) *Swinfen v. Swinfen*, 29 Beav. 211.
 (h) *Johnson v. Newton*, 11 Har. 163.
 (i) *Forsythe v. Clarke*, 4 D. G. F. &

- J. 240.
 (j) *Moyle v. Moyle*, 2 Russ. & Myl 710.
 (k) *Clough v. Bond*, 3 My. & Cr. 490.
 (l) *Challen v. Shippam*, 4 Har. 555.
 (m) *Challen v. Shippam*, 4 Har. 555.
 (n) *Walker v. Symonds*, 3 Swanst. 1, 63.
 (o) *Homes v. Diling*, 1 Cox. Eq. Cas. 1.
 (p) *Holmes v. Walker*, 5 Russ. 7. H. XIV. 243 (the law neatly summed up).
 (q) *Re Pink*, (1912) 1 Ch. 478.

immediate gift of the amount (a) If a testator appoints a debtor as executor, the executor on acceptance is deemed as debtor to have paid himself as executor and so hold the amount as assets, whether in fact paid or not, provided the executor acted as executor (b) This is the rule of equity that prevails in this country, no limitation would run so long as he remained executor or till he died, whichever event happened first (c) If however the executor renounce or die before acting, he will be in the position of a stranger debtor (d) If a creditor takes out letters of administration to the estate of his debtor, if the debtor has assets which the creditor may retain to pay himself, it amounts to extinguishment of the debt, for possession of assets amounts to payment, but not where there are no assets presently available (e).

9 Liability for breach of trust. An executor committing a breach of trust is liable to make good the loss to the beneficiaries or legatees (even in a case where the Hindu Wills Act did not apply) (f) Where persons inherit property as co-owners, each having a distinct right to his share, payment by a debtor to one of them is not a valid discharge of his entire liability (g)

10 Liability for acts of agent. In the selection and supervision of an agent, if the executor is to employ one, it is incumbent on the executor to act with the same degree of care as a man of ordinary prudence would in his own affairs and to exercise proper supervision over the conduct and dealings of the agent Even if an executor act honestly, if he fail to exercise care and diligence in the selection and supervision of the agent, he will be liable if any loss result to the estate (h).

11. With reasonable diligence The Legislature has not laid down any definite limit of time because that is not possible It will obviously vary according to the nature of the estate and the circumstances of each particular case within which the executor is to realise the securities which it is not proper to retain (i) In England a year is taken as the ordinary reasonable time, and the end of the year as the time for ascertaining the value which the executor ought to have got, and he is to be charged with this value But where a loss occurs through failure of an executor to realise within that period, the onus will lie upon him of proving that he acted *bonafide* and exercised a reasonable discretion (j) The rule as to conversion within a year, therefore is not a rule of law, but a *prima facie* rule and executors who do not convert by that time must show some reason why they did not do so, and if no good reasons are forthcoming they will be held liable for the loss (k) In

(a) *Re Pink*, (1912) 1 Ch 498 528, 532, 536 *affd* (1912) 2 Ch 528

(b) *Re Applebee* (1891) 3 Ch 422, *Upendra v Purendra* 31 C W. N 280 32 1 C. 267 *foling Nafar v Ratnamala* 15 C W N 66, 13 C L J 85

(c) *Yakub v Rahimabai* 10 Bom L R. 346, *see Adm. Genl v Kristo*, 31 C 519 8 C W N 500, *Chunduru v Neralla*, 33 M L J 195, 41 1 C 605

(d) *Ingle v Richards* 28 Beav 366, 368

(e) *Hossalnara v Rahimannessa* 38 C

342, 13 C L J 3 (*see cases cited*)

(f) *Parshottam v Kala Goindji*, 26 B 301

(g) *Sitaram v Shridhar*, 27 B 292, *Hanhar v Bhali*, 6 C L J 383, 392 sq

(h) *Lakhmichand v Jaikumarai* 29 B 170, 6 Bom L R. 907

(i) *Hughes v Empson* 22 Beav 181

(j) *Hidd ngi v Denyszen*, 12 A C 624

(k) *Grayburn v Clarkson*, 3 Ch 605; *Re Chapman* (1896) 2 Ch 763, (1896) 1 Ch 323

their duty and refuse or neglect to sue, a legatee may sue in due course of administration and the debtor may be joined in the suit (a)

13 Arbitration An executor or administrator can refer disputes regarding an account or claim relating to the estate in his hands to arbitration without the intervention of the Court but not with a view to modify the terms of the will (b) But the law will not countenance an arrangement by which the executors may get the will construed by a tribunal of their own choice and in combination with some of the legatees secure a distribution of the properties contrary to the intention of the testator and prejudicial to the interests of the remaining legatees. Executors under a will cannot make a reference to arbitration which will go against the terms of the will, even if they have not taken probate (c),

14 Limitation. The right to recover a legacy from an executor is barred under, Art 123 after 12 years from the time when the legatee becomes entitled to receive it (d)

320. (S. 279. P. 101) Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, shall be paid before all debts.

The section The section lays down the first rule regarding disbursements by an executor Funeral charges and other expenses mentioned herein have to be paid before the debts of the testator

Funeral expenses The first duty of an executor is to bury the deceased in a manner suitable to the estate left behind by him (e) No one has property in a dead body (f), but executors have a right to the custody and possession of the body until it is buried Expenses of cremation as directed by the testator by removing the body under license obtained by misrepresentation and deception can not be allowed (g) An executor in England cannot cremate a dead body without the sanction of the deceased (h) The body of a person dying in England is entitled, subject to certain exceptions, to Christian burial (i)

321. (S. 280 P. 102) The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary

- (a) *Chunduru v Neralla* 33 M L J 195, *Consell v Bell* 1 Y & C 569, *Morley v White*, 42 L J Ch 880 reld to
(b) *Soudamini v Gopal*, 21 C. L. J 273
(c) *Jnanendra v Jilendra* 32 C. W N 108 107 I C 70
(d) *Chanduru v Neralla*, 33 M L J 195
(e) *Williams v Williams*, 20 Ch. D

- 659
(f) *Reg v Sharpe* Dea & Bell, C. C. 160
(g) *Williams v Williams*, 20 Ch D 659
(h) *Re Dixon*, 1892 P 396. See S 316 note
(i) *Gilbert v Buzzard*, 2 Hagg 333 343, *Regina v Stewart*, 12 A. & E. 773

short he is not bound to convert within a year and will not be liable in the absence of *malafides* (a)

Where there is a direction by the testator in the will to convert his estate with all convenient speed the executor ought to sell as early as possible but he is not under an obligation to sell at any particular time but is entitled to exercise a reasonable discretion (b) Thus an executor has been held liable for refusing to accept a fair offer (c)

Where executors are given a discretion to sell or convert or invest in such manner as they should think fit the discretion must be exercised honestly and intelligently and with due regard to his fiduciary position as holding the money in trust for other persons (d) An executor's discretion it has been observed unlike the perfectly free discretion of an absolute owner is limited by the duty of bringing the assets into a proper state of investment within a reasonable time, particularly in respect of shares whose liability is unlimited and of trusts in favour of unborn persons (e)

A residuary legatee has a right to insist that in the course of the first year after the testator's death the executor shall if possible pay the debts legacies and funeral and testamentary expenses so that the clear residue may be ascertained and paid over to him In order to effect this object, it is the duty of the executor to sell the personal estate or at all events so much of it as is required for the payment of debts legacies and funeral and testamentary expenses and if from any cause it has been impossible to ascertain the clear residue at the end of the year still it is from that date that the right of those entitled to life interests in it commences personal estate to be in the first instance applied in payment of the debts and funeral and testamentary expenses (f)

12 Suit for recovery of debt or legacy A suit by a single legatee lies against the executors but they may ask that other legatees should be made parties (g) A creditor or a general legatee may for the purpose of recovering his debt or legacy bring a suit for administration and in that suit claim an account from the representatives of the deceased executor and payment of whatever is found due In such an action it may be necessary to join as parties persons beneficially interested in the estate but the decree in such a suit would not be for the payment of the debt as a debt but would be for an account of the moneys belonging to the testator's estate in the hands of an executor (h) The plaint may be allowed to be amended where it contains the necessary allegations but no express prayer for administration (i) A legatee however cannot sue a debtor executors are the only persons who can sue (Rs 305 306) If executors fail to do

(a) *Re Norrington* 13 Ch D 654
 (b) *Grayburn v Clarkson* 3 Ch. 605
 (c) *Fry v Fry* 27 Beav 144
 (d) *Re Smith* (1876) 1 Ch 71
 (e) *Hid'nigh v Denissen* 12 A C 624
 (f) *Bligh v Lick* v *Lo J* 6 H L C 217 276 S 337 note

(g) *Purshottam v Aala Goindji* 26 B 301
 (h) *Chanduru v Neralla* 41 I C 605 *Peake v Lodge* 8 Hare 313 (see form of decree) *Re Pandoe* (1906) 1 Ch 265 (1906) 2 Ch 184
 (i) *Chanduru v Neralla* 41 I C 605

In English law where personal assets are insufficient the real estate bears the testamentary expenses (a). But in this country the fund primarily liable is the residuary estate (b). Where, however, a testator has directed a particular fund to be charged with the payment of his testamentary expenses that fund must bear the expenses (c).

3 Costs. The section does not justify the inference that a successful party is entitled as a matter of right to be paid his costs out of the estate. A party is not entitled to his costs simply because there is *justa causa litigandi* (d). The costs are in the discretion of the Court and may be directed to be paid out of the estate in a suitable case (e), *eg* (1) if the course of litigation takes its origin in the fault of the testator (f), or (2) if the litigation be reasonable on account of the conduct of those interested in the residue (g), or (3) if there be a sufficient and probable ground to question either the execution of the will or the capacity of the testator (h), or (4) if there be sufficient ground to put forward a charge of undue influence or fraud (i), or (5) where the party opposing relies on a difficult or doubtful question of law which, it is desirable, should be decided by Court (j) where, however, the construction of a will is not so difficult as to require the assistance of the Court the estate is not to bear the costs (k), or (6) where the estate is administered by reason of the suit and the rights of the parties ascertained and declared (l). But where action is unnecessary even though judgment be in plaintiff's favour, he must pay the costs (m). A party preferring an appeal from a question of construction, if unsuccessful must bear the cost (n), but if the difficulty of construction be caused by the testator himself, the costs of appeal will come out of the estate (o). (7) Where an executor proves the will in solemn form, whether of his own motion or otherwise, he is entitled to his costs out of the estate but if probate be refused it is in the discretion of the Court to grant or refuse him costs out of the estate (p).

(a) *Re Uckerstaff* (1906) 1 Ch 762 767

(b) *Dayabhai v Damodardas* 21 B 75

(c) *Penny v Penny* 11 Ch D 440

(d) *Miles v Harrison* 9 Ch 316 323 relied on, see *Sharp v Lush* 10 Ch D 468

(e) *Barnick v Mullings* 2 Hagg Ecc 225

(f) *Mitchell v Gard* 3 Sw & Tr 275

(g) *Charter v Charter* L R 7 H L 364, *Spiers v English* 1907 P 122, *Di Sora v Phillips* 10 H L C. 624, *Aghore v Kamini* 11 C. L. J 461, *Re Taramoni* 25 C. 553 (the estate being small each party was made to bear his costs)

(h) *Barada v Gajendra* 13 C W N 557, *Mitchell v Gard* 3 Sw & Tr 275, *Williams v Henery* 3 Sw & Tr 471, *Wilson v Bassil*, 1903 P 239 but see *Spiers v English* 1907 P 122.

(i) *Tippett v Tippett* 1 P & D 54, *Alwin v Alwin*, 1902 P 203

(j) *Ferrey v King* 3 Sw & Tr 51

Williams v Henery 3 Sw & Tr 471, *Orion v Smith* 3 P & D

23, *Spiers v English* 1907 P

122, *Tippett v Tippett* 1 P & D 54 (opposition induced by statement of doctor who was attesting witness to the will)

Wilson v Bassil, 1903 P 239 (opposition based on suspicious circumstance viz a benefit conferred on a party preferring the will)

(k) *Robins v Dolphin* 1 Sw & Tr 518

(l) *Narayani v Adm Genl* 21 C 683

(m) *Merlin v Blaglace* 25 Beav 125 (cost of unsuccessful party allowed to come out of the estate) *Re Pink* (1912) 1 Ch 498

(n) *Fane v Fane* 13 Ch D 228

(o) *Clark v Henry* 6 Ch 588

(p) *Indar v Jaipal* 15 I A 127, 15 C. 725

M. 851 Tr & C 496 499 *reld*

to.

for administering the estate, shall be paid next after the funeral expenses and death-bed charges.

The section. After the payment of funeral expenses the next item of expenditure is the expense of obtaining probate or letters of administration, including the expenses of judicial proceedings in connection with the administration of the estate. Such expenditure will have priority over all other claims (a)

2 Executorship or testamentary expenses These expressions mean the same thing and denote expenses incident to the proper performance of the duty of the executor, which consists in ascertaining the debts and liabilities due from the testator's estate, the payment of such debts and liabilities, and the legal and proper distribution of the estate among the persons entitled. If the executor is unable to decide these questions for himself he may obtain the assistance of the Court, either personally appearing as plaintiff or through a beneficiary, to decide them for him, and the costs occasioned by the suit instituted by him or the beneficiary for that purpose will be allowed to him

Executorship expenses include (1) the expenses incurred in relation to the administration of his estate, whether incurred in an administration suit, or whether incurred simply by taking the advice of a solicitor and counsel outside the administration suit as to the distribution of the estate, (2) costs of the executors and parties in an action, whether instituted by the executor or by a beneficiary, for the administration of the testator's estate, (3) the funeral expenses, (4) the expenses incurred by the executors for the protection of specific legacies, e.g. warehousing expenses, pending the distribution of the assets, and (5) payments by the executors in discharge of debts falling due from the testator's estate after his death (b). The estate duty payable upon a fund which the testator was competent to dispose of is not part of the testamentary expenses (c). The amount agreed to be paid to a surety has been held to be a charge upon the estate (d). Cost of the plaintiff who unsuccessfully challenged a will were ordered to be paid out of the estate, but they were held not to be testamentary expenses (e). Costs of administration include expenses of getting in any part of the estate of the deceased lying in a foreign country and payment of all duties (f). The executor is entitled to priority for his cost in an administration suit even if the estate be insolvent (g)

- (a) *Sanderson v Stoddart* 32 Beav 155; *Gaunt v. Taylor*, 2 Hare 413; *Khurshid v Hormajsha*, 17 B 637, 644; *Barada v Gafendra*, 13 C. W. N. 557.
 (b) *Sharp v Lush*, 10 Ch D 469; *Re Clemow*, (1900) 2 Ch. 182, 197 W. 637 8 12 Ed.
 (c) *O'Grady v Wilmet* (1916) 2 A. C. 231; *Re Hudson*, (1911) 1 Ch. 206, *per contra* *Re Acery*

- (1913) 1 Ch 208, W 627, 12 Ed.
 (d) *Imam Ram v Abdul Rahim* 133 P. L. R (1906)
 (e) *Re Prince*, (1893) 2 Ch 225; but see *W'ell v De Meaulain*, 31 Beav 573 (there were good grounds for going to Court)
 (f) *Peter v Stirling* 10 Ch D 279
 (g) *Sanderson v Stoddart* 32 Beav 155.

include labourers employed on the testator's farm, (a) nor a coachman provided by a jobmaster (b) It is not necessary that the servants should receive yearly wages (c). A servant quitting her master's service a few days before her death was held entitled to the legacy on proof of his declaration that he still considered her to be in his service (d)

A domestic servant is an indoor servant, a person living in the house and dieted by the master (e) He is a household servant as distinguished from an outdoor servant A male nurse and masseur might be a domestic servant, although he did not sleep in the house nor was a wholtime servant Although service must be continuous for the period named by the testator, where a legacy is conditional on service of a certain length of time, that does not involve the necessity of daily service for the whole period Suspension of service with the testator's consent due to ill health or any other reasonable cause does not disentitle the servant from the legacy (f) A tailor is not a household servant (g) The distinction between an indoor and an outdoor servant was not adopted as suitable to the state of things in this country and a *serang* was held to come under the class of domestic servants (h)

There is however a distinction between domestic servants and labourers or artisans An agreement for *chakrs* means domestic or personal service Act XIII of 1859 does not apply to contracts to serve as domestic servants (i)

323. (S 282 P. 104). Save as aforesaid, no creditor

Save as aforesaid, all debts to be paid equally and rateably

shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets

of the deceased will extend.

1 Change Certain words occurring in Section 382 of the Act of 1865 have been omitted from the present section as being merely explanatory—Joint Committee Report

2 The section The rule laid down in this section is subject to the exceptions referred to in the saving clause namely funeral expenses, death bed charges and board and lodging for one month previous to death (Section 320), expenses of obtaining probate or letters of administration (S 321), wages for certain services rendered and debts according to their respective priorities, if any (S 322) Such is the order of payment to be observed by a representative in the course of administration He is liable for deviation from this order of priority on a deficiency

(a) *Re Forrest* (1916) 2 Ch 386

(b) *Chilcot v Bromley* 12 Ves 114

(c) *Re Sheffield* (1911) 2 Ch 267, *Blackwell v Pennant* 9 Hare 551
Re Ravensworth, (1905) 2 Ch 1 distinguished

(d) *Herbert v Reid*, 16 Ves 431, see W 738 12 Ed

(e) *Booth v Dean*, 1 My & K. 560, *Ogle v Morgan*, 1 D, G M &

G 359

(f) *Re Lawson* (1914) 1 Ch 692, but see *Bhim v Upendra*, 9 B L R appdx 4

(g) *Vithoba v Corfield*, 3 B H C R Appdx 1, 21

(h) *Dhanno v Upendra* 8 B L R 244

(i) *Re Domestic Servants*, 3 B L R Ap Cr 32

A preliminary decree may be passed in an administration suit directing an account to be taken of the estate of the deceased but no decision can be reached regarding assets not in the possession of parties to the suit (a) An administration decree is unnecessary, whether a creditor or legatee is suing, where executors have sufficient assets of the deceased to meet all claims upon the estate (b) A decreeholder of a legatee cannot take execution against the estate of the testator so long as the testator's debts have not been paid (c)

The costs of an administration suit form a charge upon an estate and the Court provides for their payment in the first instance (d) Where the assets are not sufficient for the payment of the debts in full, the creditors costs should be ordered to be paid out of the estate as between party and party and not as between attorney and client (e) and the difference between the plaintiffs cost as between attorney and client and the costs allowed to him out of the estate may be ordered to be borne rateably by the whole body of creditors In a suit for construction of a will and for administration of the estate the costs of all Courts are paid out of the estate (f)

322. (S. 281 P. 103) Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any)

Wages for certain services to be next paid, and then other debts

The section The concluding words of the section, "according to (if any)", did not occur in the Act of 1865 but were added in the corresponding section of the Act of 1881 "Mr Justice Henderson is of opinion that it was suggested by the case of *Nil Komul Shaw v Reed*, (g) in which it was laid down by Sir Richard Couch, C J, that section 282 of the Indian Succession Act (in) no way interfered with the right of a person who has obtained a decree against an executor or administrator to have his decree satisfied out of the properties of the deceased person, to the exclusion of other creditors after deducting the charges under sections 279 (now 320) to 281 (now 322) of the same Act (h) For similar provisions see the Acts mentioned below (i)

Servant. The term 'servants' means persons who minister in some way to the personal comforts of the testator or his wants persons of the class of domestic servants, though not necessarily only those employed in the house (j) It does not

- (a) *Mallikhat v Nathabhai* 45 B 1053
- (b) *Hassanalla v Popallal* 37 B 211, 171 C. 17
- (c) *Shyamal v Jamil* 741 C 437.
- (d) *Hab v De Beauvoir*, 31 Beav 573 L. 543
- (e) *Isaradas v Chandip* 61 C 267
- (f) *Upendra v Putendra*, 31 C W. N 252, 321 C 267 (olag Re Force 29 Ch D 345

- (g) 12 B L. R 287, 17 W R 513
- (h) M 852 3
- (i) Presidency Towns Insolvency Act s. 49, Provincial Insurance Act s 61 and Ind an Companies Act s 230 see also English law, 13 Geo V c 23 s 31
- (j) *Hooth v Dean* 1 My & K. 560; *Thurp v Collett* 26 Beav 147 1013

include labourers employed on the testator's farm, (a) nor a coachman provided by a jobmaster (b). It is not necessary that the servants should receive yearly wages (c). A servant quitting her master's service a few days before her death was held entitled to the legacy on proof of his declaration that he still considered her to be in his service (d).

A domestic servant is an indoor servant, a person living in the house and dieted by the master (e). He is a household servant as distinguished from an outdoor servant. A male nurse and masseur might be a domestic servant, although he did not sleep in the house nor was a wholetime servant. Although service must be continuous for the period named by the testator, where a legacy is conditional on service of a certain length of time, that does not involve the necessity of daily service for the whole period. Suspension of service with the testator's consent due to ill health or any other reasonable cause does not disentitle the servant from the legacy (f). A tailor is not a household servant (g). The distinction between an indoor and an outdoor servant was not adopted as suitable to the state of things in this country and a *serang* was held to come under the class of domestic servants (h).

There is however a distinction between domestic servants and labourers or artisans. An agreement for *chakri* means domestic or personal service. Act XIII of 1859 does not apply to contracts to serve as domestic servants (i).

323. (S. 282 P. 104). Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.

Save as aforesaid all debts to be paid equally and rateably

1 Change. Certain words occurring in Section 282 of the Act of 1865 have been omitted from the present section as being merely explanatory—Joint Committee Report

2 The section. The rule laid down in this section is subject to the exceptions referred to in the saving clause, namely, funeral expenses, death bed charges and board and lodging for one month previous to death (Section 320), expenses of obtaining probate or letters of administration (S 321), wages for certain services rendered and debts according to their respective priorities, if any (S 322). Such is the order of payment to be observed by a representative in the course of administration. He is liable for deviation from this order of priority on a deficiency

- (a) *Re Forrest* (1916) 2 Ch 386
 (b) *Chilcot v Bromley* 12 Ves 114
 (c) *Re Sheffield*, (1911) 2 Ch 267,
Blackwell v Pennant, 9 Hare 551
Re Ravensworth, (1905) 2 Ch 1
 distinguished
 (d) *Herbert v Reld*, 16 Ves 431, see
 W 738 12 Ed
 (e) *Booth v Dean* 1 My & K. 560,
Ogle v Morgan, 1 D, G M &

- G 359
 (f) *Re Lawson* (1914) 1 Ch 632,
 but see *Bhim v Upendra* 9 B L
 R appdx 4
 (g) *Vithoba v Corfield*, 3 B H C R.
 Appdx. 1, 21
 (h) *Dhanno v Upendra* 8 B
 244
 (i) *Re Domestic Servants*, 3
 Ap Ct 32

of assets (See Ss 368, 369) An executor has no right of retainer in respect of his own debts The claim of a secured creditor to proceed in respect of the property charged is not affected by this section (a) This section merely lays down a rule of procedure that must be followed by an executor or administrator and is not applicable where a creditor who has obtained a decree against the estate of a deceased person applies for execution of such decree (b)

The rule laid down in the section states that no other right of priority is to be recognised by an executor or administrator Proportional payment is provided for in order to prevent any one creditor obtaining an advantage over another in respect of the payment of his debt (c) The purport of the section is made clear by the following observations of the Law Commissioners 'We do not propose to extend to India the rule which enables an executor to pay any creditor (whether himself or another person) in preference to another creditor of equal degree We have provided that funeral and death bed expenses and charges of probate and administration are to be first paid, then wages due to any labourer, artisan or domestic servant employed by the deceased, and that in respect of no other debt shall a creditor be entitled to a preference either by reason of its being secured by deed under seal or any other account

3 English Law In case of administration by the Court of an insolvent estate all voluntary creditors are paid *pari passu* with simple creditors, because such administration is then governed by the rules of bankruptcy (d) But in case of administration by a legal representative of the estate of a deceased person, whether solvent or insolvent, the bankruptcy rules do not apply but the common law rules apply which recognise the following order of priority in the application of legal assets of deceased persons (1) Crown debts, (2) certain debts to which priority has been given by particular statutes, (3) debts of record (4) debts due upon recognisance, (5) specialty and simple contract debts, (6) voluntary bonds unless assigned for value in the testator's lifetime when they stand on the same footing as other specialty debts (e) An executor must carefully observe those rules of priority, which being the rules of law even the testator cannot alter by declaration in his will (f) An executor or administrator who pays a debt of a lower degree before one of a higher must on a deficiency of assets answer that of the higher out of his own estate provided he had notice of the existence of the superior debt In an action for a debt of an inferior nature the existence of a debt of a higher nature and in sufficiency of assets to pay both is a good plea (g)

Judgment debts against the testator or intestate have priority over the claims of creditors A judgment against the executor or administrator has no similar priority, but such a judgment has priority over other debts of equal degree because

- (a) *Diallu v Bryan* 11 P R 1678
 (b) *Ma Min v Shanmugam* 18 I C 510 5 Bar L T 289
 (c) *Omita v Adm Genl.*, 25 C 54 I C W N 371
 (d) W 634 12 Ed II XIV 244

- See *Re Hankey* (1877) 1 Ch 541
 (e) II XIV. 247
 (f) *Turner v Cor* 8 Moo P C 239 W 764 765
 (g) W 645 12 Ed

the executor ought to pay to the creditor who is more diligent (a), but has no priority over claim of a creditor of a superior degree (b). There is no priority among judgments. A judgment on a simple contract and on a specialty stand on the same footing (c)

4 Preference among creditors of the same degree. English law allows an executor to pay one creditor in preference to another among creditors of equal degree (d) and the executor may, for the purpose of such payment, advance moneys out of his own estate (e), but a judgment creditor of equal degree has to be paid first (f). An executor or administrator can pay to a creditor after commencement of an action by another creditor of equal degree but before judgment (g) or before an order in administration (h). The claim of a creditor who has been paid in preference by the legal representatives may be postponed by Court till other creditors have been paid in the same proportion (i)

5 Indian law regarding priority and preference. The Indian law recognises priority of rights among creditors (see S 322). Thus in respect of Court fees on a suit *in forma pauperis* the Crown has precedent on payment of this debt over all other creditors of the deceased (j). The priority of a judgment creditor has also been recognised in *Nilkomul v Reed* (k), where it is stated that this section declares how a representative is to administer the assets of the deceased, it does not say that he is to deal with them as if no decree had been passed. This priority, however, has not been recognised in case of a creditor who had obtained a judgment for a claim for money lent to an executor (l). It goes without saying that if any priority has been created by statute it will be duly observed.

Apart from priority thus actually recognised this section declares that no creditor is to have a right of priority over another and it further goes on to say that all creditors, including the representative himself, is to be paid equally and rateably, so that a preferential payment to one creditor is not possible under the Act, but all creditors stand on the same footing and are to be paid *pari passu* or *pro rata* (m)

6. As he knows of. An executor with notice of even a possible liability, cannot safely make payment of legacies or pay over the residue to a residuary legatee, but an order of the Court will grant him complete indemnity provided he

- (a) *Ashley v Pocock*, 3 Atk 208.
Dollond v Johnson 2 Sm & Gif 301
- (b) W 775 11 Ed
- (c) W 778 11 Ed.
- (d) *Lytleton v Cross* 3 B & C. 322.
- (e) *Re Jones*, (1914) 1 Ch 742.
- (f) *Re H Baker* (1901) 1 Ch. 9, (1900) 2 Ch. 677.
- (g) *Re Radcliffe*, 7 Ch D 733, *Re Hankes*, (1899) 1 Ch. 541
- (h) *Re Barm*, 43 Ch. D 70, see *Re Ross*, (1907) 1 Ch. 482.
- (i) *Hibon v. Paul*, 8 Sim. 63.

- Mitchell v Piper*, 8 Sim. 64 W 796 11 Ed., 649 12 Ed.
- (j) *Gayanoda v Bullo Aristo*, 33 C. 1040.
- (k) 12 B. L. R. 257, *add. in Venkatarangayan v Krishnasami* 22 M. 194, *Akashdhal v. Hormajih*, 17 B. 637, 642, *Remfry v De Penn*, 10 C. 927 but see *Esl Michael v Masachand* 29 B. 95 6 Bom. L. R. 653
- (l) *Byram v Heerchand*, 11 Bom. L. R. 252.
- (m) See *Byram v Heerchand*, 11 Bom. L. R. 250.

conceals no relevant fact from the Court (a) Knows means 'has actual knowledge' Constructive knowledge is not sufficient An executor is personally liable to make good the loss occasioned to a creditor by improper distribution after having knowledge of the claim of the creditor (b) The question whether there has been maladministration or not of the estate of a deceased person cannot be raised in execution of a decree but a regular administration suit has to be brought by a creditor who has not been fully paid up (c) Even a purchaser of lands from a Hindu devisee is liable for the debts of the testator if it can be proved that such purchaser knew that (1) that there were debts left unsatisfied and also (2) that the heir or devisee to whom he paid his purchase money intended to apply it otherwise than in the payment of such debts (d)

7 Including his own Right of retainer An executor can retain for his own debt, & any debt due to him from the deceased, in preference to all other creditors He may appropriate a sufficient part of the assets in satisfaction of his own demand, as he runs the risk of losing his debt if he be not given the right of retaining (e) The right follows from the executor's right of preference of a creditor of equal degree (f) He can retain even against a creditor of a higher degree (g), but if it be not exercised by the executor in his lifetime the right is limited to assets that came into his hands during his lifetime (h) The right of retainer is also limited to funds actually or constructively in his possession (i) The right extends not only to debts to which the legal representative is beneficially entitled but also to those to which he is entitled as trustee (j) or to those held by others in trust for him (k) or to a time barred debt (l) An executor can not retain against his co executor (m) An executor *de son tort* cannot retain (n) Trustee (and so an executor) is entitled to be reimbursed of all sums properly expended by him in the preservation of the trust estate, and the liability in respect of this indemnity forms the first charge on the estate (o)

The right of retainer does not extend to damages for which there is no certain standard but which are arbitrary & *ex gratia* damages arising out of torts (p) The right may be lost by waiver (q)

The doctrine of retainer has been recognised in this country, but of course the executor will be paid equally and rateably with the other creditors under this

- (a) W. 1078 79 11 Ed See cases cited
(b) *Asiatic Banking Corpn v Amadar* 8 B. H. C. R. O. C. 20
(c) *Saratmani v Bala Krishna* 35 C. 1100
(d) *Greender v Mackintosh* 4 C. 897
(e) W. 797 11 Ed
(f) *Talbot v Freer* 9 Ch. D. 568
(g) *Re Harris* (1914) 2 Ch. 395.
(h) *Olpherts v Corydon* (1913) 1 L. 211
(i) *Re Compton* 30 Ch. D. 15 see
(j) *Re Herman* (1896) 1 Ch. 45
(k) *Purman v Meadows* (1901) 1

- Ch. 233
(l) W. 803 11 Ed
(m) *Re Harris* (1914) 2 Ch. 395 see
(n) *Re Sutherland* (1914) 2 Ch. 720
(o) *Hilton v Hilton* (1911) 1 K. B. 327
(p) *Hill v Walker* 4 K. & J. 166
(q) W. 809 11 Ed
(r) *Cutlis v Vernon* 3 T. R. 557
(s) *Pearry Mohun v Narendra* 37 I. A. 27, 37 C. 229, 234
(t) *Re Compton* 30 Ch. D. 15
(u) *Trevelyan v Hutchins*, (1896) 1 Cl. 644, *Re Martin*, (1905) 2 Cl. 492

section. No interest can be allowed on the mortgage debt from the date when sufficient assets became available for the payment of his own debts (a).

8. Right of re-imbursement. A trustee or executor is entitled to be reimbursed of all sums properly spent by him, (1) in the preservation of the trust estate, *e g*, in payment of government revenue, (2) in defending his position (b); (3) in performing the obligations imposed upon him by the testator's will (c). The executor can also recover the cost of a sale rightly incurred (d), the cost of transfer of the trust estate from prior trustees (e) the cost of furnishing accounts (f), the cost of recovering property of the testator (g).

9 Of all debts Time barred and future debts. An executor can pay a debt justly due by his testator although barred (h), but not one declared to be barred by the Court (i). The rule does not apply to an administrator (j). The Statute of Limitation cannot be pleaded against a creditor in an administration action (k) and it cannot be set up by a Court on behalf of an absent beneficiary, where none of the parties are desirous of setting it up (l). 'The inclusion of a debt by the representative, whether in an inventory exhibited in the Probate Division, or in an account filed in administration proceedings in the Chancery Division, or in the affidavit for Inland Revenue is a sufficient acknowledgment to take the debt out of the operation of the Statute of Limitation (m)'. Future instalments of annuity do not constitute a provable debt and therefore trustees for an annuitant are not entitled to an administration decree, but if such decree be obtained by some other person the trustees would be entitled to prove for the estimated value of the annuity (n).

10. Equally and rateably. Obviously the provision for rateable payment applies where the general or realisable assets are insufficient for the payment in full of the claims of all the creditors. When assets are sufficient the payment of one creditor in full cannot in any way prejudice or postpone the rights of other creditors (o). Further, the rateable payment referred to in this section, also in the Administrator General Act (II of 1874 s 35), is rateable payment out of the assets and not out of the income of the estate or any other specific part of the assets. Neither of the two sections empowers the representatives of deceased persons where assets are admittedly sufficient, to postpone indefinitely the payment of debts. The executor must pay all such debts as he knows of equally and rateably as

- (a) *Hossainata v Rahimannessa*, 38 C 342, 13 C L J 3. See *Byramji v Heerabai* 11 Bom L R 250.
 (b) *Walters v Woodbridge*, 7 Ch. D 504.
 (c) *Peary Mohon v Norendra*, 37 C. 229.
 (d) *Re Marsel*, 54 L J Ch 893.
 (e) *Harvey v Oliver* 57 L. T. 239.
 (f) *Re Bosworth*, 58 L J Ch. 432.
 (g) *Re Davis*, 57 L. T 755.
 (h) *Hill v Walker*, 4 K & J 166., see *Re Rowson* 29 Ch D. 358.
 (i) *Tillakchand v Jitamal*, 10 B H. C. R. 206, 214, *Adm Genl v*

- Hawkins*, 1 M 267, *Pesronji v Meherbai*, 30 Bom L R 1047.
 (j) *Midgley v Midgley*, (1893) 3 Ch 282.
 (k) *Raja Ram v Fakuruddin* 53 M 480, 122 I C. 504.
 (l) *Bnggs v Wilson*, 5 D G M & G 12, *Fuller v Redman*, 26 Beav 600.
 (m) *H XIV 251 Alston v Trollope*, 2 Eq 205.
 (n) *H XIV. 252*.
 (o) *Re Hargreaves*, 44 Ch D 236.
 (o) *Omnia v Adm. Genl* 25 C. 54, 1 C. W. N. 500.

B was liable to be sued by creditors in this country and could not be called upon to pay over anything more than the surplus after satisfying intestate's Indian liabilities, this clear surplus B must hand over to A (a). The law of the deceased's domicile will not determine the priority of creditors where the assets are in foreign countries but are being administered by the legal representative of the country of the deceased's domicile. Even in such a case the distribution will be effected in the order of priority among creditors prescribed by *lex situs* (b). "After payment of debts, &c., the distribution of the residue of immovables is governed by the *lex situs*" (c).

Sub sections 2 & 3 Sub-section (2) is based upon the principle of what is 'equal and just' (d). On a similar equitable ground marshalling of assets is ordered in favour of creditors and 'a similar equity is extended in favour of legatees'. Thus where a specialty creditor, who has a general lien on the real estate, as a creditor by bond by which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, a legatee shall stand in the place of such specialty creditor as against the real assets which have descended to the heir" (e).

This sub section has lost much of its significance after the amendment of sub section (1), for under that sub section all creditors are to be paid equally and rateably according to the law of British India. Priority of claim in the application of movable property according to the law of domicile of the deceased is no longer recognised. Accordingly, there is no sense in bringing such payment into account for the benefit of other creditors, as the fresh distribution of movable and immoveable property is to be made on the same principle, *viz.*, equally and rateably under Sec 323. The illustration is clearly out of 'place and has no application, for under sub section (1) the mode of distribution is no longer effected in the manner stated in the illustration, except where sub-sec (3) applies. The debt of a Hindu, *etc.* having a foreign domicile is not to be paid according to the law laid down by sub-sections (1 & 2) but by the law of domicile.

Debts to be paid
before legacies

325. (S. 285 P. 105). Debts of every description must be paid before any legacy

1. The section The section provides that debts of the testator must be paid before any legacy even specific (f). A legacy therefore is payable when there are no debts due from the estate of the deceased. Before paying out legacies therefore there ought to be an enquiry by the executor as to the extent of the assets and liabilities of the testator, or by the court where an administration suit

(a) *Lames v Hacon* 18 Ch D 347
(b) *Hanson v Walker* 7 L J Ch 135.
Cook v Greason 2 Dr 2-6 *Wilson v Lady Dunsmuir* 18 Brav 293
(over ruled) by *Re Aiche* *Hillake* 5 111

(c) W 1051, 12 Ed
(d) *Re Aiche*, 28 Ch D 125
(e) W 1325 6, 1304 sq 11 Ld
(f) 34 C W N 761, 129 I C. 419 (see
• 361)

is brought by a legatee (a) A legatee is not entitled to the payment of his legacy until he has made good what he owes to the testator. The amount due to the estate has to be ascertained, if necessary, in order that the rights of the parties may be adjusted (b) The section does not say that if the legacy is paid before the debts and the legatee deals with the property by way of mortgage or otherwise, that transaction must be taken to be invalid A creditor of the testator who has obtained a decree cannot claim a valid charge upon the property as against a mortgagee from a specific legatee provided there are assets sufficient to pay the testator's creditors The reason is that neither a provision in the will for the payment of debts nor the decree creates a charge on the property of the testator, therefore the property sold in execution of the creditor's decree is sold subject to the mortgage by the legatee (c)

2 Debts A debt under Mitakshara law contracted by a manager will be binding on the coparceners if the debt were contracted for their benefit or for the purposes of a trading concern in which they are interested (d), so also trade debts properly incurred by a Hindu widow as the heiress of her deceased husband (e), or debts incurred by a receiver (f) A mortgage executed by the testator is binding on the legatee and has priority over the legacy (g).

3 Any legacy As the entire estate of the testator in the hands of the executor is liable "to the payment of the debts of the testator, the executor must discharge them, before he satisfies any description of legacy There is no distinction in this respect in favour of specific legacies If an executor, although acting *bona fide* and under a conviction that the assets are amply sufficient for the payment of the testator's debts permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the articles, with interest If there should ultimately be a deficiency of assets though the deficiency should be occasioned by subsequent events which he had no reason to anticipate (h) Even voluntary bonds and other debts by specialty, must be paid in preference to legacies (i) Should any difficulty arise in giving effect to the section the executor should apply to the Court for construction of the will (j) Executors are first to pay debts secondly, the legacies, thirdly, to hand over the remainder to the residuary legatee They are allowed one year before satisfying the claims of parties under the will (S 337) In fact the title of the legatees to take becomes absolute after the lapse of a year (k)

- (a) *Rajamannar v Subbalakshmi* 2 M L J 180
 (b) *Halai v Chaturbhuj*, 17 Bom L R 935, 31 I C 500
 (c) See Ss 368 369 *Ambika v Mukta*, 2 C L J 138 10 C. W N 38, *Ramdhun v Mohesh* 9 C. 406
 (d) *Baldeo v Mobarak* 29 C 583, 6 C. W N 370
 (e) *Sakrabhai v Maganlal*, 25 B 206
 (f) *Mohari v Shyama* 30 C. 937
 (g) *Numbermal v Veeraperumal* 59 M L J 596, 128 I C. 659

- (h) *Spode v Smith* 3 Russ Ch Ca 511, *Davies v Nicolson* 2 D G & J 693
 (i) W 874 12 Ed Cox v *Barnard* 8 Hare 310, *Hales v Cox*, 32 Beav 118, *Dawson v Kearson*, 3 Sm & G 186, see *Lomas v Wright*, 2 My & K 769
 (j) See *Karsandas v Ladkacahu* 12 B 185 *Byramji v Ralnagar*, 18 B 1
 (k) *Brooke v Lewis* 6 Madd 358, see *Johnson v Newton* 11 Hare 160

B was liable to be sued by creditors in this country and could not be called upon to pay over anything more than the surplus after satisfying intestate's Indian liabilities, this clear surplus B must hand over to A (a). The law of the deceased's domicile will not determine the priority of creditors where the assets are in foreign countries but are being administered by the legal representative of the country of the deceased's domicile. Even in such a case the distribution will be effected in the order of priority among creditors prescribed by *lex situs* (b). "After payment of debts, &c., the distribution of the residue of immovables is governed by the *lex situs*" (c).

Sub-sections 2 & 3. Sub-section (2) is based upon the principle of what is 'equal and just' (d). On a similar equitable ground marshalling of assets is ordered in favour of creditors and "a similar equity is extended in favour of legatees. Thus where a specialty creditor, who has a general lien on the real estate, as a creditor by bond by which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, a legatee shall stand in the place of such specialty creditor as against the real assets which have descended to the heir" (e).

This sub-section has lost much of its significance after the amendment of sub-section (1), for under that sub-section all creditors are to be paid equally and rateably according to the law of British India. Priority of claim in the application of movable property according to the law of domicile of the deceased is no longer recognised. Accordingly, there is no sense in bringing such payment into account for the benefit of other creditors, as the fresh distribution of movable and immoveable property is to be made on the same principle, *viz.*, equally and rateably under Sec. 323. The illustration is clearly out of place and has no application, for under sub-section (1) the mode of distribution is no longer effected in the manner stated in the illustration, except where sub-sec. (3) applies. The debt of a Hindu, *etc.*, having a foreign domicile is not to be paid according to the law laid down by sub-sections (1 & 2) but by the law of domicile.

325. (S. 285 P. 105). Debts of every description must be paid before any legacy.

Debts to be paid before legacies.

1. The section. The section provides that debts of the testator must be paid before any legacy even specific (f). A legacy therefore is payable when there are no debts due from the estate of the deceased. Before paying out legacies therefore there ought to be an enquiry by the executor as to the extent of the assets and liabilities of the testator, or by the court where an administration suit

(a) *James v. Hacon*, 18 Ch. D. 347.
(b) *Hanson v. Walker*, 7 L. J. Ch. 135;
Cook v. Gieson, 2 De. 286; *Wilson v. Lady Dunsany*, 18 Beav. 293 (overruled by *Re Kloebe*). *Westlake* S. 111.

(c) W. 1051, 12 Ed.
(d) *Re Kloebe*, 28 Ch. D. 175.
(e) W. 1325-6, 1304 sq. 11 Ed.
(f) 34 C. W. N. 761, 129 I. C. 419 (See s. 361).

is brought by a legatee (a). A legatee is not entitled to the payment of his legacy until he has made good what he owes to the testator. The amount due to the estate has to be ascertained, if necessary, in order that the rights of the parties may be adjusted (b). The section does not say that if the legacy is paid before the debts and the legatee deals with the property by way of mortgage or otherwise, that transaction must be taken to be invalid. A creditor of the testator who has obtained a decree cannot claim a valid charge upon the property as against a mortgagee from a specific legatee *provided* there are assets sufficient to pay the testator's creditors. The reason is that neither a provision in the will for the payment of debts nor the decree creates a charge on the property of the testator, therefore, the property sold in execution of the creditor's decree is sold subject to the mortgage by the legatee (c).

2 Debts. A debt under Mitakshara law contracted by a manager will be binding on the coparceners if the debt were contracted for their benefit or for the purposes of a trading concern in which they are interested (d), so also trade debts properly incurred by a Hindu widow as the heiress of her deceased husband (e), or debts incurred by a receiver (f). A mortgage executed by the testator is binding on the legatee and has priority over the legacy (g).

3 Any legacy. As the entire estate of the testator in the hands of the executor is liable "to the payment of the debts of the testator, the executor must discharge them, before he satisfies any description of legacy. There is no distinction in this respect in favour of specific legacies. If an executor, although acting *bona fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the articles, with interest. If there should ultimately be a deficiency of assets, though the deficiency should be occasioned by subsequent events which he had no reason to anticipate (h). Even voluntary bonds and other debts by specialty, must be paid in preference to legacies (i). Should any difficulty arise in giving effect to the section, the executor should apply to the Court for construction of the will (j). Executors are first to pay debts, secondly, the legacies, thirdly, to hand over the remainder to the residuary legatee. They are allowed one year before satisfying the claims of parties under the will (S. 337). In fact the title of the legatees to take becomes absolute after the lapse of a year (k).

(a) *Rajamannar v Subbalakshmi*, 2 M L J 183.

(b) *Halai v Chaturbhaj*, 17 Bom L R 935, 31 L C 500.

(c) See Ss. 358-369 *Ambla v Mukta* 2 C L J 139, 10 C W N 35, *Ramdhun v Mahesh* 9 C 426.

(d) *Baldeo v Moharaj* 29 C 553, 6 C W N 370.

(e) *Satrahait v Manojal*, 25 B 2 6.

(f) *Mohan v Shama* 33 C 937.

(g) *Namburmal v Perasuramul*, 59 M L J 526, 1251 C 649.

(h) *Spode v Smith*, 3 Russ. Ch. Ca. 511, *Davies v Newbold* 2 D G & J 693.

(i) W 874, 12 Ed. Cox v Bernard 8 Hare 310, *Hales v Cox* 32 Bear 115, *Dawson v Kearton*, 3 Sm & G. 145, see *Lewis v Wright*, 2 N.Y. & K. 769.

(j) See *Kanwarlal v Lallabhai* 12 B 145, *Bhatnagar v Rameswar* 15 B 1.

(k) *Brake v Lewis* 6 Phill. 355, see *Johansen v Newson* 11 Hare 150.

4 **Muhammadian will** A Muhammadian testator is not free to bequeath as legacies more than one third of his estate that remains after making the payments mentioned in Ss 320-325 without the consent of his heirs. Therefore a receiver may be appointed against an executor under the will of a Muhammadian (a)

326. (S. 286. P. 106). If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Contingent liability. A contingent liability does not constitute a provable debt till the contingency arises (b). Therefore a creditor even of an inferior degree is entitled to be paid before the contingent liability of another creditor or of a higher degree has ripened into a debt (c). But it is not safe for an executor or administrator to pay any legacy or make over the residue to the residuary legatee without regard to contingent liabilities (d). Though he may pay a creditor there is a risk in his paying a legatee, for in the latter case "he is liable to answer to the claim of a creditor whose contingent claim has ripened into a certain claim" (e). Thus an executor paying a legacy has been held liable for a call made upon certain shares held by the testator, for in respect of such a call although there is not a debt until a call is made, there is a liability all the time which might become a debt any time, *i.e.*, as soon as a call is made (f). An executor may claim a refund from a legatee to whom a legacy has been paid with notice of a liability which afterwards becomes a debt, but not of a liability which at the time of payment of the legacy has ripened into a debt and of which the executor had notice (g).

Indemnity. Naturally, to protect himself from liability the executor ought to take an indemnity from a legatee in respect of contingent liabilities which may arise and refuse to part with property of the deceased without such indemnity and "a Court of Equity will not compel him to do so without such indemnity or without impounding a sufficient part of the residuary estate for that purpose (h), for otherwise, if the contingent covenants should afterwards be broken the executor will be liable to answer the damages *de bonis propriis*, without any fault in him (i). But a decree or order of Court directing the administration and application of assets is of itself a complete and perfect indemnity to the executor, provided he keeps back nothing which ought to be disclosed to the Court (j). An executor however, without such decree or order, is not bound to pay a general legacy without taking account of the assets and liabilities of the testator and

(a) *Hafizabai v. Kazi Abdul*, 19 B 83
 (b) *Re Hargreaves*, 44 Ch D 236
 (c) *Lacey v. Fairchild*, 2 Vern. 101,
Read v. Blunt, 5 Sim 567
 (d) *Re Hargreaves*, 44 Ch D 236
 (e) *W. 1078* 11 Ed
 (f) *Taylor v. Taylor*, 10 Eq 477.

(g) *Whittaker v. Kershaw*, 45 Ch D 320
 (h) *Simmons v. Bolland*, 3 Mer 547,
Cochrane v. Robinson, 11 Sim 378
 (i) *W. 875* 12 Ed
 (j) *Dean v. Allen*, 20 Beav 1; *Dodson*
v. Sammell, 1 Dr & Sm 575;
England v. Tredegar, 1 Eq 344

ascertaining whether there is a residue for the payment of the legacy; and a suit for legacy, which is of the nature of an administration suit, is not sustainable against these assets in the possession of the executor. The Court may, when it is necessary to protect the executor direct a legatee to give an indemnity for the amount of the legacy (a). The Court will not always order retention of funds or require indemnity (b).

327. (S. 287. P. 107.) If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, or to retain any money on account of legacy to himself or to any person for whom he is a trustee.

1. The section. The section states that *general legacies* are to abate if assets be not sufficient to pay debts and necessary expenses and specific legacies, which are, therefore, to be paid before the general legacies. This abatement of general legacies takes place in equal proportions (c). The general legatees are entitled to the surplus, if any, after payment of debts, necessary expenses and specific legacies. The words 'in the absence of any direction to the contrary' in the will did not occur in the Act of 1865 but were inserted in the Probate and Administration Act. 'Here again the wording of section 107 of the Act of 1881 has been adopted as it states the law more accurately'—*Notes on Clauses*

2. Application of the section. A general legacy given to a volunteer is not exempt from abatement even where it is stated to have been given for a particular purpose or directed to have been applied in a particular manner, *e g*, legacies to executors for their care and trouble (d), or legacies of money for mourning (e), legacies of profit costs to a solicitor trustee (f), or legacies to servants (g), to charities (h), to a wife or child (i). An annuity charged on personal estate is a general legacy (j), and therefore abates proportionately with a general legacy (k). Where legacies are given "free from duty" and the estate is insufficient, the duty on each legatee is to be regarded as an additional legacy, and added to the original legacy, and then both legacies must abate rateably (l). As to abatement of demonstrative legacies, see S 329 and of annuities see S 331

(a) *Rajamannar v. Subbalakshmi*, 2 M L J 180

(b) *Re King* (1907) 1 Ch 72

(c) The rule is stated in similar language in W 1086 7 11 Ed

(d) *Duncan v. Watts*, 16 Beav 204. *Re White*, (1898) 2 Ch 217

(e) *Apreece v. Apreece* 1 V & B 364

(f) *Re Brown* 1898 W. N. 118

(g) *Att. Genl v. Robins*, 2 P. W. 23

(h) *Bishop of Peterborough v. Mortlock*, 1 Bro C. C. 565. *Re Brown* 1893 W N 118

(i) *Blower v. Morrell* 2 Ves Sen 420. *Re Schweders Estate*, (1891) 3 Ch 44 W 1094 11 Ed

(j) See S 331 *Innes v. Mitchell* 1 Ph 710

(k) W 1095 11 Ed

(l) *Re Turnbull* (1905) 1 Ch 726

3 In equal proportions The general rule is that among legacies in their nature general, there is no preference of payment, they all abate together and proportionally in case of a deficiency of assets to satisfy them all (a) A bequest to an executor has no priority over other legacies in case of a deficiency and therefore must abate (b)

4 In the absence of any direction etc The rule as regards abatement is subject to the testator's intention Therefore 'if by express words or fair construction of the Will the intent of the testator is clearly manifest to give one general legatee a priority to others that intention must be carried into effect (c) e g where a testator directs that in case of deficiency of assets a legatee is to be paid in full (d) or where anticipating a surplus of assets a testator gives further legacies to some legatees at the end of the will or by a codicil then those legatees under the will are entitled to a preference (e) There must be clear and conclusive proof of such preference (f) The intention of the testator to give priority to a particular general legatee cannot be gathered from a mere use of the words that a particular legacy is to be given immediately or that a particular legacy is to be given first then another and after the payment of these a third legacy is to be paid There must be clear positive proof that the testator intended that all the legacies should not rank equally (g)

5 Other cases of exemption from abatement Where there is a valuable consideration for a legacy e g a debt due to the legatee the legacy will not abate (h)

But there must be a debt actually due (i) A forgiveness of a debt is a specific legacy and will not abate (j) A gift to creditors whose debts have been liquidated by payment of less than their real amounts will not abate (k) as also where there has been a relinquishment of a right e g a right to dower (l) The right or interest must be subsisting at the testator's death (m)

6 Residuary legatee A residuary legatee however has no right to call upon particular general legatees to abate (n) for the residue is not determined till the general legatees are paid in full (o) But if the insufficiency of assets to pay the general legacies be due to *deceit* of the testator the question whether

(a) W 1092 11 Ed Ball v Ball 54 B 273

(b) Duncan v Walls 16 Bear 204

(c) W 890 12 Ed Lewin v Lewin 2 Ves Sen 415 Re Hardy 17 Cl D 798 803 Re Backhouse (1916) 1 Ch 65

(d) Marsh v Egan 1 P W 668

(e) All Genl v Roberts 2 P W 23 see Re Backhouse (1916) 1 Ch 65

(f) Mille v Huddleston 3 Mac & G 513 Re Schweders Estate (1871) 3 Ch 44

(g) Ball v Ball 54 B 273 27 Bom L R 564

(h) Re Whitehead (1913) 2 Ch 55 see Re Lawley (1902) 2 Ch 797 807

(i) Davies v Bux 1 Younge 341

(j) Re Bedmore (1907) 2 Ch 277

(k) Re Whitehead (1913) 2 Ch 56

(l) W 1094 11 Ed

(m) Heath v Dendy 1 Russ C C 543 Norcoll v Gordon, 14 Sim 258 see Re Greenwood, (1892) 2 Ch 295

(n) Heath v Dendy 1 Russ C C 543

(o) W 1087 11 Ed

(p) Re Lynes Estate 8 Eq 482

a residuary legatee can claim to be paid *pari passu* with the general legatees has given right to conflicting decisions (a) Sums appropriated for the payment of legacies (which had to abate for insufficiency of assets), if cease to be payable, will not sink into the residue (b), but may, if there be a direction to that effect, be divisible among the legatees proportionately (c)

328 (S. 288. P. 108) Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement

Non abatement of specific legacy when assets sufficient to pay debts

The section According to this section assets not specifically secured must be exhausted in the payment of debts and necessary expenses. If assets be sufficient for those purposes then, even if there be a deficiency for payment of general legacies, specific legacies must be delivered to the respective legatees without any abatement. The rule is based on the principle that the testator in referring to specific parts of his estate for payment of particular legacies intended those legacies as a preference to others which he had not so secured (d). As to abatement of specific legacies, see S 330

329. (S 289. P 109) Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses

The section Provision for the payment of a demonstrative legacy out of the general assets of the testator has been made in section 151. This section adds that in case of deficiency of assets there will be abatement and the payment out of the general assets is to be made equally and rateably as in the case of a general legacy (e), but this rule is of course subject to any intention to the contrary by the testator (f)

- (a) *Page v Leapingwell* 18 Ves 463.
Baker v Farmer 3 Ch 537
 (b) *Farmer v Mills* 4 Russ 86
 (c) *Re Lynes Estate* 8 Eq 482
 (d) *W 74^a Roberts v Pocock* 4 Ves 150
Robinson v Geldard 3 M & G 735 745, *Creed v Creed*,

- 11 Cl & F 491, 509
 (e) *Sahb Mita v Umda Khanam* 19 C. 444
 (f) *Chinnam v Tadkonda* 29 M 155
 159, *see Suleman v Dorab* 8 C. 1 P C.

330. (S. 290. P. 110). If the assets are not sufficient to

Rateable abatement of specific legacies. answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Illustration.

A has bequeathed to B a diamond ring valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator; and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and Rs. 666-10-8 to C.

The section. So long as there are general assets sufficient to pay debts and necessary expenses, the specific legacies will not abate with the general legacies (S. 328), but on a deficiency of assets, these specific legacies must abate rateably *inter se*, i.e., in proportion to the value of the respective legacies (a). "The rule (as to abatement) applies to a gift of a specific fund in aliquot proportions (b); but where fixed sums are given out of a particular fund, and the balance is disposed of as residue, and not as an aliquot proportion, the residue must be first exhausted" (c). Where there no other assets, the executor's costs of a suit against him may be ordered to be paid out of the specific legacies (d). Where a testator bequeathed specific chattels charged with the payment of a pecuniary legacy, *held*, the general undisposed of residue was first applicable to the payment of the pecuniary legacy notwithstanding the charge (e).

331. (S. 291 P. 111). For the purpose of abatement, a

Legacies treated as general for purpose of abatement. legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

The section. The section declares that an annuity or legacy for life, where no fund has been set apart for payment, does not enjoy any priority over general legacies, but on a deficiency of assets it must abate proportionately as if it was a general legacy (f). It is immaterial whether the annuity is to begin immediately on the testator's death or at a future time (g). An annuity even when charged on a personal estate has been regarded as a general legacy (h) and therefore abates proportionately with general legacies. "Where annuities are given by the will, and the estate is deficient, the annuities must be valued and abate proportionately and the apportioned sum must be paid to the annuitant.....where the annuity is

- (a) *Sleech v. Thorington*, 2 Ves. Sen. 560, 564; *Decon v. Atkins*, 2 P. W. 332.
 (b) *Page v. Leapingwell*, 18 Ves. 463.
 (c) *Petre v. Petre* 14 Beav. 197; see *De Lisle v. Hodges*, 17 Eq. 440; *Re Tunna*, 45 Ch. D. 66. 11. XIV. 277.
 (d) *Newdegate v. Bell*, 23 Beav. 326.
 (e) *Hewell v. Snare*, 1 D. G. & Sm.

333.
 (f) *Bal Bhikaji v. Bal Dinbat*, 13 Bom. L. R. 319.
 (g) *Wright v. Callender*, 2 D. G. M. & G. 652; *Innes v. Mitchell*, 1 Ph. C. C. 710; *Re Cottrell*, (1910) 1 Ch. 402.
 (h) *Innes v. Mitchell*, 1 Phil. C. C. 710 716; *Miller v. Huddellstone*, 3 D. G. & G. 513.

defeasible upon the happening of an event in the lifetime of the annuitant, there is a conflict of opinion whether the capital value of the annuity ought to be paid to the annuitant' (a) Annuities of course abate among themselves

Valuation of annuity As to the mode of valuation of annuity see the authorities referred to below (b)

Where no sum has been appropriated This section has been viewed as 'an amplification of the definition and illustrations of specific bequests contained in' S 142, *et seq.* It draws a distinction between a gift of a definite rent charge or annual sum bequeathed, where particular property has been appropriated to produce it, in which case the gift will be specific, and a gift of the income of some fund or movable property in its nature of a fluctuating amount and therefore not specific and consequently the loss will be borne by the annuitant (c) Where a fund directed to be set apart by the testator is insufficient for the payment of a legacy or an annuity, then the income from the rest of the testator's property must contribute (d) The last farthing of property must contribute in case of a simple bequest of an annuity (e) The whole of an annuity of course is to be satisfied before any part of the residue is paid to the residuary legatee (f).

CHAPTER VIII

OF ASSENT TO A LEGACY BY EXECUTOR OR ADMINISTRATOR

Assent necessary
to complete legatee's
title

332. (S. 292. P. 112.) The assent of the executor or administrator is necessary to complete a legatee's title to his legacy

Illustrations

(i) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor

(ii) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator

- (a) *Re Sinclair* (1897) 1 Ch 921
Re Cottrell (1910) 1 Ch 402
 H XIV 276 7
 (b) *Todd v. Bieby.* 27 Beav 693.
 353. *Potts v. Smith.* 8 Eq 424.
Re Metcalf (1903) 2 Ch 424.
Felding v. Preston 1 D &
 438 H XIV 277.

- 12 Ed
 (c) *Bal Bhikaji v. Bal Denbat* 13 Bom L R 319 See W 1097
 (d) *Jaiaram v. Kuceral,* 9 B 510
 (e) *Croly v. Weld,* 3 D 993, 996
 (f) S. 176.

1. **The section** The wording of the section has been criticised because strictly construed it leaves legatees at the mercy of perverse or capricious executors (a) On the death of a testator his estate vests in the executor and becomes assets in the hands of the latter for the payment of funeral and testamentary expenses and debts of the former as stated in S 320 *sq* and these have priority of payment over legacies (S 325) In order to enable the executor to meet these prior claims and therefore to protect him from the claims of legatees the law requires the executor's assent to the legacies, whether general or specific, before the legatee's title can be complete (b)

2. **Object and effect of assent** The only object of assent, it has been pointed out, is to put the executor in possession of his property The will becomes operative, so far as its dispositions are concerned, only if and when the executor assents to these dispositions So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels The transfer is made not by the mere force of the assent of the executor but by virtue of the dispositions of the will which have become operative because of this assent (c) A legatee cannot claim possession of a legacy without such assent, even where its necessity has been dispensed with by the testator by a direction in the will, for otherwise, a testator may defeat the just claims of creditors by such directions (d) Even the forgiveness of a debt due from a debtor of the testator requires the assent of the executor for its effective discharge (e) Before such assent the legatee has an inchoate right to the legacy which is however transmissible to his own personal representatives in case of his death before it is paid or delivered Though on the assent of the executor the full title passes to the legatee, the assent creates no new title, it merely perfects the title under the will and hence if the legacy is void, the assent avails nothing, the legatee's interest before assent is transmissible to his representative, also a legatee can deal with such interest *e.g.* mortgage it before assent (f) and the mortgage will not be invalid even when the debts of the testator remain unpaid (g)

It follows from the necessity of assent that if a legatee take possession of the thing bequeathed without such assent the executor can sue the legatee for the recovery of the thing even if the bequest be specific (h) If an executor withhold his assent without just cause he may be compelled to give his assent by a Court of Equity (i) The assent of the executor completes or perfects the title

(a) See *Hassonally v Popallal* 37 B 211, 17 I C 17 (a legatee can bring an administration suit before assent by the executor)

(b) *Khagendra v Khelra* 50 C 171, 71 I C 314 cited in *Papurbal v Chukhermal* 114 I C 105

(c) *Allenborough v Solomon* 1913 A C 76 *Re Smith* 42 Ch D 302

(d) W 1100 11 Ed

(e) *Sethup v Mosam* 1 Ves Sen 41 50 W 895 12 Ed (How far such a gift resembles a legacy

see W 1100 *f n* 11 Ed
(f) *Khagendra v Khelra* 50 C 171 36 C L J 21, *Salabhai v Bai Saffabu* 36 B 111 *Lakshamma v Ratnamma*, 38 M 474

(g) *Ambika v Mukta* 2 C L J 133

(h) *Khagendra v Khelra*, 50 C 171, *Mead v Orriero* 3 Atk 239

(i) *Re Pitt*, (1901) W N 165 *Martin v Wilson* (1913) 1 Ir 470 W 695 12 Ed

of the legatee, i.e. the thing bequeathed vests immediately in the legatee and absolutely so that he can sue the executor or any other person for its recovery (a), but the executor does not thereby make himself an express trustee of the subject matter of the legacy and cannot make a reference under S 34 of the Trust Act (b). After assent an executor can bring and maintain an action in his own name (c).

The effect of the executor's assent is to give effect to the legacy from the death of the testator (d) and the legatee is entitled to mesne profits from the time of the testator's death or a year thereafter in case of present gifts (e). But assent cannot justify payment to a person who is not entitled to it and the rightful legatee, after obtaining the executor's assent, can recover the legacy with mesne profits (f).

An assent may be of part of a legacy (g) or of a residuary legacy (h), but there is a difference between an assent to a specific gift and an assent to a residuary bequest arising from the fact that in the case of the latter the thing bequeathed is not in existence like the former and does not come into existence till it is ascertained, i.e. until after payment of debts and testamentary expenses and costs of administration. There may be a promise to pay the residue when ascertained, but that is an entirely different thing from an assent to the bequest of a specific thing. Therefore the doctrine of relation back of the legatee's title upon the assent by the executors in case of a specific legacy does not apply in the case of a residuary bequest (i). But every legatee, whether general or specific, whether of chattels real or personal must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect, before such assent, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it be paid or delivered (j). An assent once given is irrevocable, unless there arises a deficiency of assets which was not known or could not have been anticipated at the time the assent was given (k). On the same ground it has been held that after an executor has once assented to a legacy and notwithstanding a subsequent dissent a specific legatee has the right to take a legacy, a lien on the assets for that specific part, and a right to follow them (l). An executor who has once assented to a legacy under this section is incapable of dealing with the property any further e.g., by way of mortgage, unless there be

- (a) *Williams v Lee* 3 Atk. 223, *Re Culverhouse* (1896) 2 Ch. 251
- (b) *Trimbak v Narayan* 33 B. 429 Limitation Act S. 10 Lewin 1007
- (c) *Watkins v Watkins* 121 I. C. 177
- (d) S. 336 *The King v. Commissioners &c.*, 1919 W. N. 242, see S. 336
- (e) See S. 349 sq.
- (f) *Re West* (1909) 2 Ch. 180
- (g) *Elliot v Elliot* 9 M. & W. 23
- (h) *Austin v Beddoe* 41 W. R. 619
- (i) *Kesho Prasad v Madho Prasad* 3 Pat. 660, 83 I. C. 812 (executor

- also residuary legatee does not take under the will until he assents to the dispositions taking effect)
- (i) *The King v. Commissioners &c.* (1920) 1 K. B. 468, *Khagendra v Khetsra*, 50 C. 171, 36 C. L. J. 21
- (j) *Khagendra v Khetsra* 50 C. 171, 71 I. C. 314 cited in *Papurbal v Chuhermal* 114 I. C. 105
- (k) *Coppin v Coppin* 2 P. W. 291, *Orr v Kaines* 2 Ves. 191
- (l) W. 907, 12 Ed. citing *Atwood v Orrery*, 3 Atk. 235, 238

cogent reasons for doing so (a) Thus assent may be retracted where given on an erroneous but reasonable belief that assets would be sufficient to meet debts and no injury is done to third parties Even if the legacy be paid or made over a legatee may be compelled to refund (b) The general rule is that when an executor has assented to a legacy and set aside funds to meet it he becomes a trustee (c) and the statute of Limitations does not apply (d) Whether there has been an assent is generally speaking a question of fact though it may involve matters of law (e)

3 Form of assent There is no particular form of assent prescribed in the Code nor does this section require the assent to be expressly given in all cases therefore it may be implied It is express when a legatee is authorised to take possession of the legacy, it is implied when his concurrence is to be inferred from informal expressions or particular acts sufficiently clear to indicate intention and such constructive permission shall be equally effective (f) But such informal expressions must be clear and unambiguous (g) The principle is that if an executor, in his manner of administering the property does any act which shows that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy but if his acts are referable to his character of executor they are not evidence of an assent to the legacy (h) A small matter, it has been said shall amount to an assent an assent being but a rightful act (i) Thus an acceptance by an executor of a term for a legatee to whom it has been bequeathed by the testator or the application of rents or interest of a bequest to the maintenance of a minor pursuant to the direction by the testator are instances of implied assent so also payments by an administrator with the will annexed of the rent of a leasehold property bequeathed by the testator to a legatee and charging the legatee with payments so made (j) because the payment of a charge subject to which a legacy is given amounts to an assent of the bequest (k) But the mere fact that an executor has made general payments to or for the benefit of a legatee of leaseholds or other property not specially out of or on account of the rents is not in the absence of representations on the subject by the executor to the legatee sufficient to enable the Court to infer that the legacy has been assented to (l) A gift of a particular estate followed by a gift in remainder constitutes one estate so that an assent to one implies assent to the other (m) An executor's assent may be presumed from certain circumstances in certain cases e g, where an executor dies after debts have been paid but before legacies have

- (a) *Maile v Jollindra* 28 C L J 141
Ballard v Marsden 14 Ch D 374
 (b) W 927 12 Ed II *Walker* 166
 (c) *Re Smith* 42 Ch D 302
 (d) *Phillips v Munnings* 2 My & Cr 309
 (e) *Thorne v Thorne* (1873) 3 Ch 196, *Elliott v Elliott* 9 M & W 23
 (f) W 895 12 Ed
 (g) See *Doe v Hutt* 16 M & W

- (h) 517
Doe v Sturges 7 Taunt 217
 223
 (i) *Noel v Robinson* 1 Vera 90
Walker 165
 (j) *Doe v Calberley* 6 C & P 126
 (k) *Young v Holmes* 1 Stra 70
 (l) *Thorne v Thorne* (1873) 3 Ch. 196 leadnote
 (m) *Steenenson v Ma or &c* 10 Q B 81
Re Susan (1875) 1 Ch 221

been satisfied (a), or where a legatee has been allowed to retain possession of a thing bequeathed for a considerable time without complaint by the executor (b),

4. Time for assent An executor is not bound to hand over a legacy within a year from the testator's death (S 337), in as much as debts are payable before legacies (S 325) Therefore it is his duty first to ascertain whether the assets are sufficient to meet the debts and testamentary expenses until he is so satisfied he ought not to give his assent for the payment of a legacy, for otherwise he makes himself liable to the creditor (S 357) who will generally speaking, be entitled to follow the legacies (c) There is no rule debaring an executor from giving his assent before obtaining probate and the death of an executor without obtaining probate does not affect the validity of the assent (d)

5 Conveyance not necessary Assent is sufficient and no conveyance is necessary to vest the property in the legatee (e) (see next section) Even in case of real estate an executor is entitled to assent in preference to executing a conveyance (f) An executor is entitled to a release from life tenants under a will because the latter are entitled to possession and use of the properties devised to them subject to impeachment for waste (g)

6 Suits for legacies In a suit for the payment of legacy the Court ought to raise an issue as to the existence and amount of assets and liabilities so as to determine whether there is any residue out of which the legacy can be paid (h) A legatee can sue the executor for the payment of the legacy after the lapse of a year from the testator's death though the executor has not assented (i) After probate has been granted any legatee who has received the executor's assent can bring and maintain an action in his own right The executor may be a proper but is not a necessary party (j) Where there is no assent of the executor a suit for legacy must include a demand for administration of the whole estate (k) and an order for administration may be obtained against the executors who fully represent the estate without making all persons interested parties An administration suit was not necessary where the Hindu Wills Act did not apply (l) No court has jurisdiction to decree a legacy simply unless the executor has assented to that particular legacy or unless the whole matter is before it for administration and the plaint must disclose one or other of the facts A Small Cause Court has no jurisdiction to entertain a suit for administration (m) Where a legatee sues an executor for his legacy the executor may for his own protection, ask that the other

(a) W 1105 see *Cray v Willis* 2 P W 529

(b) *Cole v Miles* 10 Hare 179, *Richardson v Gifford* 1 Ad & EL 52.

(c) See *Re Halle's Estate* 13 Ch D 696, *Leaky v Malyno*, (1896) 1r 206 but see *Blake v Gale* 32 Ch D 571

(d) *Brazier v Hudson*, 8 Sim 67 H. 217 267

(e) *Re Calcehouse*, (1896) 2 Ch 251

(f) *Re Pix*, 1901 W N 165

(g) *Chitmanao v Rambhau*, 4 Bom.

L R 508

(h) *Rajamannar v Subbalakshmi* 2 M. L. J 180

(i) *Rajamannar v Venkata* 25 M 361 *Salabhai v Bai Safaba*, 36 B 111, *Hassonally v Popallal* 37 B 211 14 Bom L. R. 782

(j) *Watkins v Watkins*, 121 J C 177

(k) *Salabhai v Bai Safaba*, 36 B 111

(l) *Purshottam v Kala*, 26 B 301, 3 Bom. L. R. 932.

(m) *Okhoy v Aoylassi*, 17 C. 337

cogent reasons for doing so (a) Thus assent may be retracted where given on an erroneous but reasonable belief that assets would be sufficient to meet debts and no injury is done to third parties Even if the legacy be paid or made over, a legatee may be compelled to refund (b) The general rule is that when an executor has assented to a legacy and set aside funds to meet it he becomes a trustee (c) and the statute of Limitations does not apply (d) Whether there has been an assent is generally speaking a question of fact, though it may involve matters of law (e)

3 Form of assent There is no particular form of assent prescribed in the Code, nor does this section require the assent to be expressly given in all cases therefore, it may be implied It is express when a legatee is authorised to take possession of the legacy, it is implied when his concurrence is to be inferred from informal expressions or particular acts sufficiently clear to indicate intention, and such constructive permission shall be equally effective (f) But such informal expressions must be clear and unambiguous (g) The principle is 'that if an executor, in his manner of administering the property, does any act which shows that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy, but if his acts are referable to his character of executor, they are not evidence of an assent to the legacy' (h) A small matter, it has been said shall amount to an assent, an assent being but a rightful act (i) Thus an acceptance by an executor of a term for a legatee to whom it has been bequeathed by the testator, or the application of rents or interest of a bequest to the maintenance of a minor pursuant to the direction by the testator, are instances of implied assent, so also payments by an administrator with the will annexed of the rent of a leasehold property bequeathed by the testator to a legatee and charging the legatee with payments so made (j) because the payment of a charge subject to which a legacy is given amounts to an assent of the bequest (k) But the mere fact that an executor has made general payments to or for the benefit of a legatee of leaseholds or other property, not specially out of or on account of the rents, is not in the absence of representations on the subject by the executor to the legatee, sufficient to enable the Court to infer that the legacy has been assented to (l) A gift of a particular estate followed by a gift in remainder constitutes one estate so that an assent to one implies assent to the other (m) An executor's assent may be presumed from certain circumstances in certain cases e g, where an executor dies after debts have been paid but before legacies have

- (a) *Maire v Jolindra* 28 C L J 141 *Ballard v Camden* 14 Ch D 374
 (b) W 937 12 Ed Walker 166
 (c) *Re Smith* 42 Ch D 302
 (d) *Phillips v Mannings* 2 My & Cr 309
 (e) *Thorne v Thorne* (1873) 3 Ch 196, *Elliott v Elliott* 9 M & W. 23
 (f) W 635 12 Ed
 (g) *See Doe v Han*, 16 M & W

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 (h) *Doe v Sturges* 7 Taunt 217 223
 (i) *Noel v Robinson* 1 Vera 90 Walker 165
 (j) *Doe v Colthorley* 6 C & P 126
 (k) *Young v Holmes* 1 Sta 70
 (l) *Thorne v Thorne* (1873) 3 Ch. 196 headnote
 (m) *Stevens v La or &c* 10 Q B 81, *Re Swan* (1915) 1 Ch 22

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5 Conveyance not necessary Assent is sufficient and no conveyance is necessary to vest the property in the legatee (e) (see next section). Even in case of real estate an executor is entitled to assent in preference to executing a conveyance (f). An executor is entitled to a release from life tenants under a will because the latter are entitled to possession and use of the properties devised to them subject to impeachment for waste (g).

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- (a) W 1105 see *Cray v Wills* 2 P W 529
 (b) *Cole v Miles* 10 Hare 179
Richardson v Gifford 1 Ad & El 52
 (c) See *Re Hallels Estate* 13 Ch D 696 *Leaky v Molyno* (1896) 11 206 but see *Blake v Gale* 32 Ch D 571
 (d) *Brazier v Hudson* 8 Sim 67 H 14 267
 (e) *Re Culverhouse* (1896) 2 Ch 251
 (f) *Re Pir* 1901 W N 165
 (g) *Chimnarao v Rambhau* 4 Bom

- L R 508
 (h) *Rajamannar v Subbalakshmi* 2 M L J 180
 (i) *Rajamannar v Venkata* 25 M 361 *Salebhai v Bai Safiabai* 36 B 111 *Hassonally v Popallal* 37 B 211 14 Bom L R 782
 (j) *Watkins v Watkins* 121 J C 177
 (k) *Salebhai v Bai Safiabai* 36 B 111
 (l) *Parahottam v Kala* 26 3 Bom L R 932
 (m) *Okhoy v Koylash* 17

legatees be made parties, so that if any rateable abatement is necessary the extent of such abatement may be ascertained in a manner binding on all parties (a)

7. Limitation. In respect of a suit for a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate the limitation is 12 years from the time when the legacy becomes payable. In as much as a legacy is not payable for one year after the testator's death, a legatee has really 13 years within which he may bring such a suit. In a suit for legacy the legatee is entitled to claim no more than the amount of his legacy or share of the residuary estate, so also a creditor can obtain only the amount of his debt and not damages (b)

Article 123 and not Article 120 applies when the substantial claim is to recover a legacy, whether the suit involves administration of the whole estate or not (c). Again Article 123 is applicable whether the property to which the suit relates is sought to be recovered as a legacy from the executor or other person who represents the estate, otherwise Article 49 applies (d). A suit for the recovery of movables is governed by Article 120 (e). A suit by reversioners to recover possession of property on the death of a Hindu female comes under Article 141 (f).

Where managers under a will allowed somebody else to remain in possession for more than 12 years the right of the devisees was extinguished under Article 140 and a claim by the managers would be disallowed. A suit against this adverse order must also fail (g). A suit for construction of a will and for declaration of the plaintiff's rights is a continuing right and may be claimed within the statutory period (h). Persons cannot claim by possession an interest in property different from what they would have taken if the property had passed by deed or will; therefore, where a deed or will does not operate in law to pass the property mere possession for more than 12 years cannot give them any higher interest than that which they would have taken if the property had passed by deed or will (i).

Article 91 has no application to wills (j). The Statute of Limitations has no application where persons receive property in their fiduciary position to keep it until it is called for, nor where the person liable for the payment of a legacy and the person entitled to receive it are the same (k), nor where the executor is himself indebted to the estate of the testator (l).

- (a) *Purnakottam v Kala* 26 B 301
 (b) *Cussetjee v Dadabhai* 19 M 425, see *Krishna v Panchuram* 17 C 272 276
 (c) *Rajamannar v Venkata* 25 M 351, 12 M L J 183, *Rajah Perihasarath v Rajah Venkatadri* 16 M 190 43 M L J 4*6
Salekhal v Bal Safaku 36 B 111
 (d) *Isur v Jugaut* 9 C 79
 (e) *Runchor'as v Panchabai* 23 B 225
 (f) *Srinath v Pothunna* 9 C 934.

- Chakkun v Lolit* 20 C 906
 (g) *Kishra Kinkur v Parchuram* 17 C 272, *Vasudeo v Chinath* 35 B 79 50 L C 6
 (h) *Chakkun v Lolit* 20 C 906
 (i) *Rajah Venkata v Rajah Surenant* 31 M 321
 (j) *Sajid Ali v Ibad Ali* 23 C 1 10
 (k) *Narandas v Narandas* 31 B 418 9 Bom L R 257
 (l) *Yakub v Bal Rahmatul* 10 Bom L R 346

333. (S. 293 P. 113). (1) The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator

Illustrations.

(i) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied

(ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest

(iii) A bequest is made of a fund to A and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B

(iv) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed

(v) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

The effect of assent to specific legacy. Upon assent by the executor a specific legacy vests absolutely in the legatee without any formal assignment (a)

When there is a specific legacy the first duty of the executor is to consider whether he assents to it or not. If he assents to it properly passes out of him and is in the specific legatee, and from that moment the executor cannot possibly interfere with the possession of the chattels, cannot claim them from anybody else, and the legatee who has the legal title is the person to recover them, and to do what is necessary' (b). The legatee can sue the executor for its recovery (c). Upon assenting to a specific bequest given to the executors in trust, they forthwith become trustees for those interested and the properties cease to be part of the testator's estate and cannot be dealt with as such by the executor. There is a distinction between the liability of executors and that of trustees. If one of several executors receive part of the testator's property, he alone is answerable for it, and his co-executors are not liable (d). An assent to one of several legatees of a specific bequest will generally speaking be an assent in favour of all (e)

(a) *Re Culterhouse*, (1896) 2 Ch. 251

(b) *Re Scott*, (1915) 1 Ch. 592, 606, 607

(c) *See Doe v. Guy*, 3 East. 120.

Williams v. Lee, 3 Atk. 223.

(d) *Dix v. Burford*, 19 Beav. 409;

Trimlak v. Narayan, 33 B. 427;
see *Atterborough v. Solomon*, 1913
A. C. 76

(e) *Steterson v. Liverpool*, L. R. 10
Q. B. 81

Specific legacy, if assented to, becomes vested in the legatee who can sue for its recovery with mesne profits. Where the assent is followed by payment or possession the gift will be good even if the gift be revoked and bequeathed to another by a codicil and a fresh probate be granted (a). Where the executors assent to specific legacies of shares or mortgages the cost of transfer, including the executors' own costs in connection therewith, must be borne by the specific legatees (b).

Sub-section (2) This sub section does not lay down any rule peculiar to specific bequests. This is made clear by the reference to S 335 which indicates that assent may in all cases be either express or implied.

334. (S. 294. P. 114). The assent of an executor or administrator to a legacy may be conditional, and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

Illustrations

(1) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(2) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

The section. Illust (1) may be taken as an illustration of the rule that an 'executor has no power to attach as a condition to his assent the performance of some subsequent act by the legatee' (c), e.g. that "the legatee will pay the executor a certain sum annually, such condition is void" (d) and the assent will be deemed to be absolute. The assent will also be void as being contrary to public policy. But an executor can attach a condition precedent, provided it is such as the executor can enforce or legally impose. Illust (2) is an instance of a valid condition precedent. Another illustration may be furnished by a case of an executor insisting on a legatee the payment of the arrears of rent due at the testator's death in case of a gift of leasehold property, but a condition requiring a legatee to go to New York and there do something for the executor's personal benefit would be invalid and the assent therefore considered absolute (e).

335 (S. 295 P. 115). (1) When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is

(a) *Re West*, (1907) 2 Ch 180.
 (b) *Re Grosvenor* (1916) 2 Ch 375 W
 899 12 Ed
 1 IL XIV 265

(d) W 935 *Elliott v Elliott* 9 M &
 W. 28
 (e) W 1105, 11 Ed

to another person, and his assent may, in like manner, be expressed or implied.

(2) Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use This is assent

1. Assent to his own legacy. The assent of an executor to his own legacy is necessary for its vesting just as in the case of any other legatee. The reason also is the same, viz., that "until he has examined the state of the assets he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in the satisfaction of debts. Until the executor has made his election, either express or implied, he shall take the legacy as executor, though all debts have been paid independently of such bequest" (a). If there be a specific bequest to an executor on trust and the executor assent to it, whether expressly or impliedly, the executor holds the property not as executor but as trustee and he has no power to deal with it. An assent by one of several executors to a legacy given to him is sufficient where the gift is to all of them, assent of one will vest in him alone his own proportionate share in the legacy (b). Of course a gift to an executor *qua* executor (c) implies that he should prove the will or otherwise should manifest an intention to act as executor before he becomes entitled to the gift (S 141). An executor renouncing probate cannot assent to his own legacy but the assent of the administrator with the will annexed is necessary (d).

2. In the same way, etc. These words plainly indicate that the assent of an executor in every case may be express or implied (e).

3. Sub-section (2). It has been pointed out (f) that this sub section is based on the case of *Doe v. Sturges* (g) where the rule is thus laid down: "If an executor in his manner of administering property does any act which shows he has assented to the legacy, that shall be taken to be evidence of his assent, but if his acts are referable to his character of executor, they are not evidence of assent to the legacy" In other words, assent, if implied, must be of an unequivocal character, i. e. applicable only to his title as legatee (h).

4. Express or implied. The executor's "assent to his own legacy may, as well as his assent to that of another legatee, be either express or implied. Therefore, if the executor were to say that he will have the legacy according to the Will, or if by a deed reciting that he has a term of years by devise, grant it over; this will amount to an assent to take it as a legatee. So if he

(a) W. 1109, 11 Ed

(b) W. 1113, 11 Ed H XIV 267.

(c) *Prosser v. Adm* Genl 15 C 83.

(d) W. 1113, 11 Ed

(e) See S. 332. W 897.

(f) K. 560 M 873

(g) 7 Taunt. 217

(h) W. 697 12 Ed.

take the profits of a term to his own use, or repair the tenement bequeathed at his own expense, or if he exclude a co executor from joint occupancy with him, all these acts indicate an assent to the bequest' (a) Thus entry is evidence of assent where the whole of a leasehold interest is given to an executor, but if the gift be for life, or of a partial interest, entry is not evidence of assent (b) Assent may be implied from lapse of time under the circumstances of a particular case (c)

336. (S. 296. P. 116) The assent of the executor or administrator to a legacy gives effect to it from the death of the testator

Effect of executor's assent

Illustrations

(i) A legatee sells his legacy before it is assented to by the executor The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy

(i) A bequeaths 1,000 rupees to B with interest from his death The executor does not assent to his legacy until the expiration of a year from A's death B is entitled to interest from the death of A

The section The rule laid down in the section shows that the interest in a legacy vests in a legatee on the testator's death (d), though the actual transfer of the legacy does not take place till assent is given by the executor' (e) but as soon as it is given the legacy takes effect from the testator's death (f)

Exception The Administration of Estates Act of 1925 (15 Geo V c 23 S 36) expressly makes the rule subject to a contrary intention appearing in the will that is to say, the legacy will relate back to the testator's death only when the gift is immediate The rule does not also apply where after assent to a legacy a codicil is discovered by which the legacy given to the legatee by will is revoked and given to another (g)

337. (S. 297. P. 117). An executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration

A by his will directs his legacies to be paid within six months after his death The executor is not bound to pay them before the expiration of a year

- (a) W 1108 11 Ed
(b) *Doe v Sturges* 7 Taunt 217, 221, *Att Genl v Potter* 5 Beav 164, *Richards v Browne* 3 Bng N C 493 500 But where other circumstances are present these coupled with entry may indicate assent *Doe v Tatchell* 3 B & Ad 675 *Trot v Tull* 1 Coll 352 aff'd 22 L J Ch 1032 W 877 879
(c) *Allenborough v Solomon* 1913 A C 76

- (d) See *Gartshore v Challe* 10 Ves 1 13 cited under next S
(e) See *Allenborough v Solomon* 1913 A C 76, *Lakshamma v Ratnamma* 35 M 474
(f) *The King v Commissioners &c* (1927) 1 K B 469, *Ahagendra v Aheta* 50 C 171, cited under S 332 see also *Doe v Sturges* 7 Taunt 217 223 See S 332 notes 2 & 5
(g) *Re Best* (1922) 2 Ch 183

1. **Executor's year.** The rule laid down in the section is based on the necessity of allowing the executor some time to examine the estate left by the testator and to inform himself of the testator's property before he makes any distribution of the assets. This period has been fixed at one year from the testator's death (a). No legatee can insist upon being paid within a year from the testator's death which is, therefore, called the executor's year. One year is given by law to liquidate the assets. To liquidate means to reduce the estate into possession cleared of debts and other immediate outgoings, and so left free for enjoyment by the heirs. It is not, therefore, necessary for the ascertainment of the residue that it should be converted into money (b).

The year allowed to the executors and administrators is only for convenience and does not prevent the vesting of interest (c). The executors may, if they choose, pay legacies or hand over the residue within the year (d). If they take a longer time, the onus is thrown on them to justify the delay. It is the *prima facie* rule and not a fixed rule in England that conversion must take place within the year (e).

The rule laid down in the section, it should be noted, applies to payments to legatees and not to creditors who can sue within the year. The liability of an executor or administrator for failure to realise the assets and consequential damage to the estate is in no way affected by this rule which deals solely with the question of payment of legacies. Nor does this section grant immunity to an executor against suits by creditors of a testator, but he is liable to be sued the moment after the testator's death (f).

2. **Interest.** As to interest on a legacy see S. 342 note.

3. **Direction by the testator.** The rule laid down in the section it will be observed, is not subject to any direction to the contrary by the testator. During the year therefore a testator cannot be compelled to pay any legacy even though directed by the testator (g). Convenience points to the construction that the period of 12 months from the testator's death, when the estate ought to be distributed, should be taken as the period of final division of the estate referred to in a will (h). Where a testator directed a residue to be divided among those of certain persons named as should be living at the time of the distribution, held, it was to be divided among those living at the end of one year from the testator's death (i).

A testator may, by a direction in his will, give the executor a longer period than one year and thereby postpone payments. Such a direction does not amount to a direction to accumulate nor does it prevent the accrual of the rights of the

- (a) *Wood v Penoyre* 13 Ves 325
 (b) *Macleod v Sorabji* 7 Bom L R 755
 (c) *Garthshore v Chale* 10 Ves 113
 (d) *Angerstein v Marten* 1 Turn & R 232, *Garthshore v Chale* 10 Ves 1, 13
 (e) *Grayburn v Clarkson* 3 Ch 695

- (f) *Nicholls v Jackson* 2 Atk 300, W. 844, 12 Ed
 (g) *Wood v Penoyre* 13 Ves 325
Benson v Masie 6 Mod 15
 (h) *Macleod v Sorabji*, 7 Bom L R 755
 (i) *Broske v Lees* 6 Mod 354, see *Macleod v Sorabji*, 7 Bom L R 755

legatees or annuitants (a) Where an executor is given a discretion to postpone the conversion of the testator's estate he is not bound to convert within a year (b)

4 Residuary legacy A residuary legatee has a right to insist that in the course of the first year after the testator's death, the executor shall if possible pay the debts legacies and funeral and testamentary expenses so that the clear residue may be ascertained and paid over to him In order to effect this object it is the duty of the executor to sell the personal estate or at all events so much of it as is required for the payment of debts legacies and funeral and testamentary expenses and if from any cause it has been impossible to ascertain the clear residue at the end of the year, still it is from that date that the right of those entitled to life interests in it commences personal estate to be in the first instance applied in payment of the debts and funeral and testamentary expenses (c) A residuary legatee is no doubt beneficially interested in the estate subject to the payments of debts and legacies and the discharge of trusts but he is not the proprietor until after the administration has been completed and the residue has been ascertained (d) But where there is ample estate the court may order payments to be made to persons interested in the residue before accounts have been taken (e)

CHAPTER IX

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES

338. (S 298 P 118) Where an annuity is given by a will and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event

The section This Chapter deals with the application of the rule laid down in S 337 to the case of an annuity In case of a gift of an annuity, in the absence of any direction by the testator (S 340) it shall commence from but not be payable till the expiration of one year after the testator's death In valuing an annuity where there is a deficiency of assets the practice of the Court is to ascertain its value at the testator's death (f) Income tax should be deducted from annuities

- (a) *Adm. Genl v Hughes* 40 C. 197
 (b) *Re Norrington* 13 Cl D 654
 (c) *Wightwick v Lord* 6 H L C 217 226
 (d) *Garnida v Anclak* 36 C 28 12 C W N 1065 1074; *Wrold v* Ser 111 7 Bom L R 755

- (e) *Dagby v Boycott* 4 Hare 441 W 910 12 Ed
 (f) *Coxon v Holt* 7 Ves 89 95, 97
Hoghton v Franklin 1 Sm & St 377
Re Rodd (1877) 2 Cl 8 13

unless they have been given free from income-tax (a). A sum of money directed to be invested in the purchase of an annuity does not carry interest before the expiration of the year (b). Of course such a fund is a vested legacy (c) and the annuitant at his option can either claim the sum or have it laid out in an annuity (See S. 174). If the annuitant die after the testator the personal representatives of the former are entitled to such a sum as would at the testator's death have purchased the annuity (d). As to investment of an annuity see S. 343.

339 (S. 299. P. 119). Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year.

The section. The section is obviously based on the following passage in Williams (e). "Where an annuity is expressly directed to commence within the year, as at the first quarter day after the testator's death (f), or where an annuity is given with a direction that it should be paid monthly (g), the money will be due at the first quarter day in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor, till the end of the year "

340 (S 300 P. 120). (1) Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorises the first payment to be made.

(2) If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

The English rule. "Where a testator gives an annuity to A for life, payable quarterly, the first payment to be made within 18 months after his death, the annuity does not commence till 15 months from the death of the testator. Where a testator gives an annuity to A for life, and directs the first payment to be made within one

(a) *Re Sharp*, (1906) 1 Ch. 793;

Re Foster, (1920) 1 Ch. 391.

(b) *Re Friend*, 78 L. T. 222. W. 911,

12 Ed.

(c) *Barnes v. Rowley*, 3 Ves. 305;

Re Robbins, (1907) 2 Ch. 8, 11.

(d) *Re Robbins*, (1907) 2 Ch. 8.

(e) P. 911.

(f) *Stone v. Price*, 3 Mod. 167.

(g) *Houghton v. Franklin*, 1 Sim. &

Sta. 392.

month from his, the testator's, death the annuity commences from the death of the testator, and though the first payment is to be made at the appointed time, the payment for the second year does not become due till the end of the year' (a)

Sub-section (2) This sub section provides for apportionment of an annuity In the Apportionment Act, 1870, (33 & 34 Vict c 35 S 2), it is provided 'From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income shall, like interest on money lent be considered as accruing from day to day, and shall be apportionable in respect of time accordingly "

CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES

341. (S 301. P. 121). Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may by any general rule authorise or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

The section The section is based on the decision in *Howe v Lord Dartmouth* (b) where it is laid down as a general rule 'that where personal property is bequeathed for life with remainder over, and not specifically, it is to be converted into 3 per cents subject in the case of a real security to an enquiry, whether it will be for the benefit of all parties, and the tenant for life is only entitled upon that principle' The section enlarges the scope of investment by directing investments in such security as the High Court may direct The reason is that in the absence of a contrary intention, a Court of Equity will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession and as the only means of giving effect to such intention, will direct the conversion into permanent investment of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous (c) Contrary evidence to rebut the presumed intention of the testator is manifested when the bequest is specific (d), or there is an indication of

(a) *Julia v Boehm* 12 2 Russ & My 331
(b) *J Voss* 133
(c) *Metcalf v Innes*, 8 Ch D

101, 112
(d) *Lord v Goffey* 4 Padd 435
Cochran v Cochran 14 Sim 243.

intention that the property is to be enjoyed in specie though the gift is not specific (a)

Application of the rule The rule in its practical application operates as follows. If any part of the testator's personal estate is at the time of his death invested in some security, the tenant for life is not entitled to the actual income accruing therefrom but only to the dividends on so much of the recognised securities as the proceeds of the property, if converted at the end of a year from the testator's death, would have purchased (b) "But with regard to those parts of the personal estate which neither were at the testator's death, nor have since been, in such a state of investment as ought to be recognised and allowed to be continued by the Court they must be valued as at a period of one year after his death, and interest at the rate of three per cent (now four) per annum from his death on the value so taken, must be paid to the tenant for life" (c) But the tenant for life cannot demand payment of anything more than the income actually produced from the time of investment of the property in any of the recognised modes of security after the property has been got in (d) For a list of recognised securities see Indian Trusts Act, II of 1882, S 20

342. (S 302 P 122) (1) Where a general legacy is given to be paid at a future time, the executor or administrator shall invest a sum sufficient to meet it in securities of the kind mentioned in section 341.

Investment of general legacy, to be paid at future time, disposal of intermediate interest

(2) The intermediate interest shall form part of the residue of the testator's estate

The section In an old case it has been laid down that where a legacy is not immediately payable, the person entitled may come into a Court of Equity and pray that a sufficient sum may be set apart to answer the legacy when it shall become due (e) This is known as appropriation in the strict sense of the term (f) Where a fund is thus appropriated the legatees bear the losses or enjoy the additions caused by fluctuations in the prices of the stocks in which the sums are invested (g)

- (a) *Collins v Collins* 2 M & K 703 *Green v Britten* 1 D G J & S 649 *Thursby v Thursby* 19 Eq 395, *Re Bland* (1899) 2 Ch 336 *Re Rogers* (1915) 2 Ch 437 Such evidence was held not to be indicated in *Lichfield v Baker* 12 Beav 447, *Macdonald v Irvine*, 8 Ch D 101 *Re Wareham* (1912) 2 Ch 311 W 918 12 Ed where other cases are cited
- (b) *Dmes v Scott* 4 Russ 195 *Mackenzie v Taylor* 7 Beav 467, *Morgan v Morgan* 14 Beav 72 92, *Taylor v Clark* 1 Hare 161, *Brown v Gellally* 2 Ch 751, *Porter v Baddeley* 5 Ch.

- D 542 W 912 sq 12 Ed
- (c) W 913 12 Ed *Caldecott v Caldecott* 1 Y & C C. C. 312, 737 *Cox v Cox* 8 Eq 343, *Wilkinson v Duncan* 23 Beav 469 *Re Hengler* (1893) 1 Ch 586
- (d) *Taylor v Clark* 1 Hare 161, 170
- (e) *Phipps v Annesley* 2 Atk 57, *Johnson v Mills* 1 Ves. Sen 282 explained in *Re Hall* (1903) 2 Ch 226 W 922 3 12 Ed
- (f) *Re Hall* (1903) 2 Ch 226
- (g) *Green v Pigot* 1 Bro C. C. 106, *Burgess v Rolfe* Meriv 7, 10, but see *Bernard*, 6 Ves. 520

With regard to interest on general legacies payable at a future time the rule is that they will carry interest from the time fixed for their payment even though the legacy be vested (a). The general rule is that legacies will carry interest as from a year after the testator's death. The burden rests upon those who assert that the legacy is not directed to be paid until a future time to make it out, in which case the interest runs from such future time (b). "Where however a fund is severed immediately from a testator's death (under a direction in the will) for the benefit of the objects of the gift, not only is the gift vested, but carries the interim income, though the only gift is in a direction to take at a future time" (c). Where it appears to be the testator's intention to maintain the legatee out of the income then he will be entitled to the intermediate income (d). Legacies to children of the testator, if the legatees be not adult, will carry the intermediate interest (e).

343 (S. 303. P. 123). Where an annuity is given

Procedure when no fund charged with, or appropriated to, annuity

and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity

can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341.

English rule Annuitants seem to be better off here than in England, for there the utmost that they are entitled to is to see that proper securities are given which will make it practically certain that the annuities will be fully paid. They are not entitled as a matter of right to have the estate converted and sums sufficient to answer the annuities invested in approved securities (f). The Court, however, has jurisdiction to set apart a sufficient sum to answer an annuity and release the residuary estate, and the annuitant, if necessary, can resort to the corpus of the fund (g).

In case of deficiency. In case of deficiency of income after investment to produce the requisite amount of annuity, the annuitant is entitled to have the deficiency made good out of the residuary estate of the testator (h), but where the gift is not of an annuity of a fixed amount but of the interest of a particular stock named by him then the legatee cannot have the deficiency made good out of the residuary estate of the testator (i).

- (a) *Heath v Perry* 3 Atk 101
 (b) *Walford v Walford*, 1912 A C 658
 (c) *W.* 956, 12 Ed *Re Inman* (1893) 3 Ch 519 *Re Woodin* (1895) 2 Cl 307, *Re Eyre*, (1917) 1 Ch 351
 (d) *Re Churchill* (1911) 2 Ch 341, *see Re West* (1913) 2 Ch 345
 (e) *W.* 956
 (f) *Re Perry* 42 Ch D 370, *Re*

- Potter* 50 L. T. 8.
 (g) *Hardin v Masterman* (1896) 1 Ch 184 *W.* 921 12 Ed
 (h) *May v Bennett*, 1 Russ 370, *Davies v Wallier*, 1 Sim & Sta 43, *Carmichael v Gre*, 5 A C 598, *Hill v Masterman* (1896) 1 Ch 351 *W.* 924, 925 12 Ed
 (i) *Kendall v Russell* 3 Sim 424; *see Baker v Baker* 6 H L C 616 624 *W.* 926, 12 Ed

Contrary direction A direction by the testator to invest an annuity in a particular fund cannot be departed from (a)

344 (S 304 P 124) Where a bequest is contingent, the executor or administrator is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if it shall become due

The section The section is based on the authority of *Webber v Webber* (b), where it is laid down that if a legacy be given upon a contingency, the Court will not direct a sum of stock, belonging to the estate, to be appropriated to pay the legacy when the contingency happens, but will direct the whole residue to be paid over to the residuary legatee on his giving security to pay the legacy when it becomes due. In some earlier cases appropriation was ordered where there were contingent legacies (c). But that view no longer prevails. It is now settled that where a legacy is contingent, and no interest in the meantime, i.e., until the happening of the contingency, goes to the legatee, then the legatee cannot claim appropriation but is only entitled on the happening of the contingency to receive the amount of the legacy in full in cash (d).

Appropriation in case of a contingent legacy In case of a vested interest payable in future a legatee can insist upon appropriation and the gain or loss upon investment would fall upon the legatee. But in case of a contingent legacy, the interest, until the happening of the contingency does not go to the legatee but remains part of the testator's estate therefore even in case of investment by the executor, there is no such appropriation as will compel the legatee to bear the loss or entitle him to take the profit arising upon such appropriation. In fact an executor has no authority to make an appropriation without the consent of the legatee. In other words an executor is not entitled at his own will to take a part of the estate which he is holding to answer the contingent legacy and turn it into a trust fund, treating the contingent legatee as a *cestui que trust*. But the executor is not personally liable for the deficiency if he has acted reasonably and has set apart an ample sum to answer the legacy. A purely contingent legacy without any intermediate interest to the legatee, therefore, does not prevent the executor or Court from distributing the residue after taking reasonable care to provide for the contingent legacy (e).

The fund set apart to meet a contingent legacy is residue until it is wanted and the legatee with a vested interest is entitled to the intermediate income of the fund set apart to meet the contingent legacies (f). But in case of a vested legacy subject to defeasance on the happening of an event, the legatee is entitled

(a) *Re Orthwaite*, (1891) 3 Ch 494

(b) 1 Sim & Sta 311

(c) *Carey v Askew* 2 Bro C C 58

(d) *Re Hall*, (1903) 2 Ch 226, see

King v Malcott 9 Hare 692.

Re Salaman (1907) 2 Ch 46

W 924 925 12 Ed

(e) *Re Hall*, (1903) 2 Ch 226

(f) *Allhusen v Whittle*, 4 Eq 295

to the legacy at the end of a year from the testator's death with (a) or without (b) security for refund

345 (S. 305) (1) Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in securities of the kind mentioned in section 341 shall be converted into money and invested in such securities

(2) This section shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person

The section. The section reproduces S 305 of the Act of 1865 but as the provision does not occur in the Act of 1881, the proviso inserted is necessary—Notes on Clauses

The rule The rule laid down in *Houie v Lord Dartmouth* (c) says that if the residuary personal property of a hazardous or wasting nature be bequeathed to a person for life, with remainder over, not specifically, then in the absence of any direction to invest it in any particular manner it is to be converted and invested in permanent investments of a recognised character, in the interest of the remainder-man, subject in case of real security, to an enquiry whether it will be for the benefit of the parties. In general a person having a life interest in the residue has a right to call on the executors or trustees to convert into money all personal property of a perishable or speculative character, everything, in short not consisting of proper securities for money, so that it may be properly invested (d)

Application of the rule The rule only applies to residuary gifts and not to specific bequests (e). It being presumed to be the intention of the testator that his legatees should enjoy the same thing in succession (f). The rule does not apply in the case of immovable property situate in foreign countries (g). The rule, however, has been applied to certain kinds of specific bequests in England e.g., to short leaseholds (h), foreign bonds (i), shares in trading companies (j) a business carried on by the testator (k), and generally to all investments not authorised by law, and does not apply to real estate (l).

- (a) *Colston v Morris* 6 Madd 89
 (b) *Fawkes v Gray* 15 Ves 131
 (c) 7 Ves 137 2 Wh & T L C
 (d) *Hightwick v Lord* 6 H L C 217, 22^a
 (e) *Mills v Mills* 7 Sim 501 *Re Toolfale's Estate* 2 Ch D 628, *Beilane v Kennell* 1 My & Cr 114 1211
 (f) *Pickering v Pickering* 4 My & Cr 253 *Coffe v Bant* 5 Ha 24, *Moskall v Bant* 5 Ch 101 *Le Sturges* (1771) 2 Ch

- 779 782, *Re Bates* (1937) 1 Ch 22 26
 (g) 11 XIV 233 *Morgan v Morgan* 14 Bear 72, 82, *Re Hultuck* (1895) 1 Ch 754
 (h) *Chambers v Chambers* 15 Sim 183
 (i) *Re Shaw's Trusts* 12 Eq 124
 (j) *Thornton v Ellis* 15 Bear 193, *Re Shaw's Trusts* 12 Eq 124
 (k) *Attkin v Hault* 11 Bear 273
 (l) *Yates v Yates* 29 Bear 617 1 Vol III p 1205 7 Ld

If the testator's property be not so converted, the income arising therefrom is treated as capital and the legatee for life is to be paid thereout a sum equal to what the produce of the sale and investment, if made by the executor, should have fetched (a)

The rule has been declared to be "purely an artificial rule and is often calculated to defeat what the testator would have wished in order to give effect to his intentions and slight circumstances will be sufficient to show that the rule is not to be put in force" (b) The rule is also subject to the testator's intention to the contrary which must, however, be manifest on a fair construction of the will, the onus lies on those who seek to exclude the operation of the rule (c)

The rule as laid down in the section is however peremptory, the words used being 'shall be converted into money and invested', and does not admit of the exceptions allowed by English law unless the case comes under the next section or unless under the terms of the bequest a tenant for life is entitled to enjoy the property in specie until conversion when he will be entitled to the income actually produced by the residuary estate until conversion and investment according to the directions of the will (d)

346. (S. 306. P. 125) Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

The section. The section lays down an exception to the rule stated in the previous section and applies where there is a direction by a testator to invest in any specified securities whether authorised or not. A testator therefore, may prevent the operation of that rule by expressly or impliedly directing that any particular item of property shall not be converted (e) Executors accordingly can retain the money invested upon those securities or invest upon those securities the money obtained by conversion of any part of the testator's estate. Where it is construed to be the intention of the testator that the property is to be enjoyed in a particular manner then conversion is not allowed (f) Where there is an express trust for conversion and a power to retain securities of every kind, authorised and unauthorised, and there is no express gift of the income pending conversion

(a) J 1209 10 7 Ed
(b) *Simpson v Lester*, 4 Jur N S 1269, *Morgan v Morgan*, 14 Bear 72.
(c) *Macdonald v Irvine*, 8 Ch. D 101
(d) *Macfie v Macfie* 5 Hare 70, *Sparling v Parker*, 9 Bear 524
(e) *Hightwick v Lord*, 6 H L C.

217, 22^a
(f) *Pickering v Pickering* 4 M & C 289, *Holgate v Jennings* 24 Bear 623, *Tharby v Tharby* 19 Eq 395, *Re Chancelor* 25 Ch. D 42, *Re Rogers* (1915) 2 Ch. 437. W 91^a 12 Ed., where others cases are cited.

the general rule is that the tenant for life is entitled to the income of the authorised securities, but not entitled to the income of unauthorised securities (a)

347. (S. 307. P. 126.) Such conversion and investment as are contemplated by sections 345 and 346 shall be made at such times and in such manner as the executor or administrator thinks fit; and, until such conversion and investment are completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market-value (to be computed as at the date of the testator's death) of such part of the fund as has not been so invested :

Provided that the rate of interest prior to completion of investment shall be six per cent. per annum when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

The section. It is well settled that a legatee for life of the residue is entitled, during the first year of the testator's death, to the dividend on so much of 3 per cent stock as would have been produced by the conversion of the property at the end of the year (b). If there be a direction not only to invest the corpus of the property but also the income then the tenant for life is not entitled to the income (c) Where the tenant for life is under the will entitled to enjoy the income until conversion, then he is entitled to the whole of the income until conversion and investment (d).

At such times, etc. The section gives a discretionary power to the executor as to the time and manner of sale. If any part of the testator's property be invested in unauthorised securities it is the duty of the executor to convert them at the earliest moment at which they can be converted (e). If the property cannot be conveniently sold then a value is set upon it and the tenant for life is entitled to interest on such value and the residue of the income, if any, is to be invested. The tenant for life is entitled to the interest on such investment (f)

Where property is not capable of immediate conversion without loss and damage to the estate, the rule is not to convert the property, but to set a value upon it and to give to the tenant for life 4 per cent on such value and the residue of the income must then be invested and the income of the investment paid to

(a) *Re Chaylot* (1905) 1 Ch 233, see *Meyer v Simonsen*, 5 D G & S. 723

(b) *Morgan v. Morgan*, 14 Beav. 72, 92; *Brown v. Gellatly*, 2 Ch. 751. The rule is based on the authority of *Dimes v. Scott*, 4 Russ 193

(c) *Swell v. Bernard* 6 Ves 527.

Vigor v Harwood, 12 Sim 172; *Vickers v Scott*, 3 M & K 500

(d) *Mackie v Mackie*, 5 Hare 70; *Spurling v Parker*, 9 Beav 524.

See S 345 note

(e) *Brown v Gellatly*, 2 Ch 751.

(f) *Gibson v Ball* 7 Ves. 87; *Re Llewellyn's Trusts*, 29 Beav 171; *Wright v. Lambert*, 6 Ch D 661

the tenant for life, but the corpus must be secured for the remainderman (a) Where there was direction in the will for immediate conversion and investment and the trustees neglected to do so and loss accrued, *held*, that non conversion was a breach of trust and the executor must make good the difference between the value of the securities at the end of one year from the testator's death and their value when paid into Court (b) There is no fixed rule in England that conversion must be made by the end of the year, but that is the *prima facie* rule and executors who do not convert by that time must show some reasons why they did not do so (c)

Where the trustees are given power in their absolute and uncontrolled discretion to postpone the realisation of the testator's estate the beneficiaries entitled cannot compel the trustees to realise at once (d) An executor's discretion is not a perfectly free discretion like that of an absolute owner but is limited by the duty of bringing the assets into a proper state of investment within a reasonable time and where he is charged with delay or negligence the onus lies on him of proving that he has acted *bona fide* and exercised a reasonable discretion The rule in England is that if an executor fails within a reasonable time to convert investments which require conversion the end of a year is in the absence of circumstances pointing to a different date, to be taken as the time for ascertaining the value which he ought to have got (e) Trustees have a discretion which they must exercise as practical men with due regard to all the circumstances of the case It is not their absolute duty to call in the mortgage where the security has fallen in value (f)

Trust for conversion The rule applies where there is a trust for conversion, even though there be a discretionary power to postpone conversion or to retain existing securities (g) unless there is a gift to the tenant for life of the actual income derived from the estate pending the conversion (h) The mere absence of a direction to convert is not sufficient to exclude the operation of the rule (i), but where there is no trust for conversion an express power to retain existing investments is sufficient to exclude the rule (j), and for this purpose there is no distinction between unauthorised securities of a wasting and those of a permanent nature (k) A discretionary power of sale as opposed to a direction to convert, is also sufficient to exclude the application of the rule (l)

- (a) *Meyer v Simonsen* 5 D G & S 72, *Brown v Gellatly* 2 Ch 751
- (b) *Bale v Hooper* 5 D G M & G 333, *Grayburn v Clarkson*, 3 Ch 605
- (c) *Grayburn v Clarkson* 3 Ch. 605
- (d) *Re Kipping* (1914) 1 Ch 62
- (e) *The Helra Hdd nch v Denysen* 12 A C. 624 632 3
- (f) *Re Medland* 41 Ch D 476
- (g) *Re Woods*, (1904) 2 Ch 4, *Re Chaytor* (1935) 1 Ch 233
- (h) *Mackie v Mackie*, 5 Hare 70.

- Re Thomas* (1891) 3 Ch. 422
- H XIV 283
- (i) *Morgan v Morgan*, 14 Beav 72 82
- (j) *Gray v Sggers* 15 Ch D 74, *Re Sheldon* 39 Ch D 50, *Re Wilson*, (1907) 1 Ch. 394, *Re Nicholson*, (1909) 2 Ch. 111
- (k) *Re Nicholson* (1909) 2 Ch 111
- (l) H XIV 283 *Simpson v Lester* 4 Jar N S 1269, *Re Pilcaim*, (1896) 2 Ch. 199, *Re Bentham* 94 L T 307

the general rule is that the tenant for life is entitled to the income of the authorised securities, but not entitled to the income of unauthorised securities (a)

347. (S. 307. P. 126.) Such conversion and investment as are contemplated by sections 345 and 346 shall be made at such times and in such manner as the executor or administrator thinks fit; and, until such conversion and investment are completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market-value (to be computed as at the date of the testator's death) of such part of the fund as has not been so invested

Provided that the rate of interest prior to completion of investment shall be six per cent. per annum when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

The section. It is well settled that a legatee for life of the residue is entitled, during the first year of the testator's death, to the dividend on so much of 3 per cent stock as would have been produced by the conversion of the property at the end of the year (b). If there be a direction not only to invest the corpus of the property but also the income then the tenant for life is not entitled to the income (c) Where the tenant for life is under the will entitled to enjoy the income until conversion, then he is entitled to the whole of the income until conversion and investment (d).

At such times, etc. The section gives a discretionary power to the executor as to the time and manner of sale. If any part of the testator's property be invested in unauthorised securities it is the duty of the executor to convert them at the earliest moment at which they can be converted (e). If the property cannot be conveniently sold then a value is set upon it and the tenant for life is entitled to interest on such value and the residue of the income, if any, is to be invested. The tenant for life is entitled to the interest on such investment (f).

Where property is not capable of immediate conversion without loss and damage to the estate, the rule is not to convert the property, but to set a value upon it and to give to the tenant for life 4 per cent on such value and the residue of the income must then be invested and the income of the investment paid to

- (a) *Re Chaylor* (1905) 1 Ch 233, see *Meyer v Simonsen*, 5 D G & Sm 723
 (b) *Morgan v Morgan* 14 Beav 72, 92. *Brown v Gellatly* 2 Ch 751. The rule is based on the authority of *Dimes v Scott*, 4 Russ 195
 (c) *Sitwell v Bernard* 6 Ves 520.

- Vigor v Harwood* 12 Sim 172
Vickers v Scott 3 M & C 1, 501
 (d) *Mackie v Mackie* 5 Hare 71
Sparling v Parker 9 Beav 54
 See S 345 notes
 (e) *Brown v Gellatly* 2 Cl 751
 (f) *Gibson v Bitt* 7 Ves 11
Hewell v Smith 21 L J 11
Wright v Lanct 6 Cl D 1

the tenant for life but the corpus must be secured for the remainderman (a) Where there was direction in the will for immediate conversion and investment and the trustees neglected to do so and loss accrued, *held* that non conversion was a breach of trust and the executor must make good the difference between the value of the securities at the end of one year from the testator's death and their value when paid into Court (f) There is no fixed rule in England that conversion must be made by the end of the year, but that is the prima facie rule and executors who do not convert by that time must show some reasons why they did not do so (c)

Where the trustees are given power in their absolute and uncontrolled discretion to postpone the realisation of the testator's estate the beneficiaries entitled cannot compel the trustees to realise at once (d) An executor's discretion is not a perfectly free discretion like that of an absolute owner but is limited by the duty of bringing the assets into a proper state of investment within a reasonable time and where he is charged with delay or negligence the onus lies on him of proving that he has acted *bona fide* and exercised a reasonable discretion The rule in England is that if an executor fails within a reasonable time to convert investments which require conversion the end of a year is in the absence of circumstances pointing to a different date to be taken as the time for ascertaining the value which he ought to have got (e) Trustees have a discretion which they must exercise as practical men with due regard to all the circumstances of the case It is not their absolute duty to call in the mortgage where the security has fallen in value (f)

Trust for conversion The rule applies where there is a trust for conversion, even though there be a discretionary power to postpone conversion or to retain existing securities (g), unless there is a gift to the tenant for life of the actual income derived from the estate pending the conversion (h) The mere absence of a direction to convert is not sufficient to exclude the operation of the rule (i) but where there is no trust for conversion an express power to retain existing investments is sufficient to exclude the rule (j), and for this purpose there is no distinction between unauthorised securities of a wasting and those of a permanent nature (k) A discretionary power of sale as opposed to a direction to convert, is also sufficient to exclude the application of the rule (l)

- (a) *Meyer v Simonsen* 5 D G & S 72 *Brown v Gellatly* 2 Ch 751
 (b) *Bate v Hooper* 5 D G. M & G 338, *Grayburn v Clarkson* 3 Ch 605
 (c) *Grayburn v Clarkson* 3 Ch 605
 (d) *Re Kipping* (1914) 1 Ch 62
 (e) *The Heirs Hddingh v Denysen* 12 A C 624 632 3
 (f) *Re Medland* 41 Ch D 476
 (g) *Re Woods* (1904) 2 Ch 4 *Re Chaytor* (1905) 1 Ch 233
 (h) *Mackie v Mackie* 5 Hare 70

- Re Thomas* (1891) 3 Ch 482
 H XIV 283
 (i) *Morgan v Morgan* 14 Beav 72 82
 (j) *Gray v Sggers* 15 Ch. D 74, *Re Sheldon* 39 Ch D 50, *Re Wilson* (1907) 1 Ch 394, *Re Nicholson* (1909) 2 Ch. 111
 (k) *Re Nicholson* (1909) 2 Ch 111
 (l) H XIV 283 *Simpson v* 4 Jur N S 1269, *Re* (1896) 2 Ch 199, *Re* 94 L. T 307

Apportionment between tenant for life and remainderman. As regards the adjustment of equities between the tenant for life and remainderman, see the cases cited below (a)

How the interest is to be paid. A residuary legatee has a right that in the course of the first year after the testator's death the debts and legacies shall, if possible, be paid and the clear residue ascertained, and, even if that be not possible, it is from that date that the right of those entitled to life interests in it commences, and, therefore, when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively what was the residue at the end of the year, attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest (b).

The legatee can not claim payment till the property in respect of which it is payable is actually invested. Every tenant for life of residue, therefore, is entitled to income of all such part of the residue as is not required for the payment of debts and which is found to be in a proper state of investment. He is entitled to the income of that property from the death of the testator (c).

348. (S 308. P. 127.) (1) Where, by the terms of a

Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf

bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same

into the Court of the District Judge, by whom or by whose District Delegate the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee is a ward of the Court of Wards.

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid.

(4) Money when paid in under this section shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person

(a) *Re Chesterfield's Trusts*, 24 Ch D 643. *Re Rowls*, (1900) 2 Ch 107. *Re Davy*, (1906) 1 Ch 61; *Re Beech*, (1920) 1 Ch 40. See W. 915 12 Ed 1 = for adjustment on deficiency of assets.
(b) *Wright v Lord* 6 H L C. 217, 227. *Wright v Lambert*, 6

Ch. D 649; *Re Chesterfield's Trusts*, 24 Ch D 643. *Re Henglet* (1893) 1 Ch 586. *Re Beech*, (1920) 1 Ch 40.
(c) *Allhusen v Hittell*, 4 Eq 295, 302 3; commd in *Re Mc Euen* (1913) 2 Ch. 704

entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

Where legatee is a minor. A legacy cannot be paid to an infant legatee without the sanction of a Court of Equity and, in the absence of a direction in the will, it cannot be made over to his father (a). The father cannot sue for the legacy due to his infant son (b), nor can he receive payment on behalf of his son where the latter has attained majority unless the son ratifies the payment (c). A subsequent ratification by an infant legatee on attaining age will prevent him from claiming the legacy again (d). Payment to any person directed by the testator to be made on behalf of an infant legatee entitles him to give a good discharge to the executor (e).

Appropriation. Where a legatee is a minor both the executors and the Court have power to appropriate a sum of money to answer the legacy and, in a proper case, to invest it for the benefit of the legatee, and if the executor acts reasonably and sets aside a sufficient sum he will not be personally liable for the deficiency in case of depreciation of the security in which the sum has been invested (f). But the more modern view is that the only way of freeing the residue i.e., preventing the residuary legatees from being liable on deficiency is by paying the legacies into Court (g). The Trustee Act 1893 provides for payment into Court. Here also under the Official Trustees Act (II of 1913 S. 12) an executor or administrator can make over the legacy to the Official Trustee and no order of Court is necessary for the transfer.

Where the gift is not immediate. Where the gift is not immediate but is to take effect on the infant attaining majority or at a subsequent period, then in both cases he can claim the gift on attaining majority (h).

Maintenance allowance. An infant legatee, in the absence of a direction to that effect, is not entitled to maintenance out of the income of a legacy given to him contingently on his attaining majority (i), unless the testator is the father or stands in loco parentis to the legatee (j) and no separate provision for his maintenance has been made (k).

- (a) *Dagley v Tolferry*, 1 P. W. 285 W. 927.
 (b) *Rotherham v Farnshaw* 3 Atk 629.
 (c) *Cooper v. Thornton*, 3 Bro. C. C. 96.
 (d) W. 927.
 (e) *Cooper v Thornton*, 3 Bro. C. C. 96.
 (f) *Re Hall*, (1903) 2 Ch. 226, 233.
 (g) *Re Salaman*, (1907) 2 Ch. 46.
 (h) *Re Salaman*, (1907) 2 Ch. 46.
 (i) *Re Salaman*, (1907) 2 Ch. 46.
 (j) *Re Salaman*, (1907) 2 Ch. 46.
 (k) *Re Salaman*, (1907) 2 Ch. 46.

- (1920) 1 Ch. 290 W. 928.
 (h) *Curtis v Lukin*, 5 Beav. 147, 155, 156. *Josselyn v Josselyn*, 9 Sim. 63. *Re Wrey*, 30 Ch. D. 507; *Re Coulurier*, (1907) 1 Ch. 470; *Re Namburnholme*, (1912) 1 Ch. 489 W. 921.
 (i) *Re Dickson*, 29 Ch. D. 331.
 (j) *Re Bawley*, (1904) 2 Ch. 625.
 (k) *Re George*, 5 Ch. D. 837, 843; see W. 1135.

Interest when
no time fixed for
payment of general
legacy.

351. (S. 311. P. 130) Where no time has been fixed for the payment of a general legacy, interest begins to run from expiration of one year from the testator's death.

Exception.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

The section. Where no time is fixed, the legacy is payable at and bears interest from the end of a year from the testator's death. This will be so even though the legacy may be directed to be paid out of a fund which cannot be realised within the year (a). The period of one year is given to the testator, as has been observed before (S. 337) in order to reduce the estate into possession and therefore interest on legacies begins to run from the end of that period (unless some other period is fixed by the will), though actual payment within that period may be impossible (b) or though the assets do not fetch any income (c). A direction to the executor to pay legacy as soon as possible does not entitle the legatee to claim interest from the testator's death, but it must run from the end of a year after his death (d).

In England a demonstrative legacy, like a general legacy, bears interest, where no time has been fixed by the testator for its payment, from the expiration of a year after the testator's death (e). The same rule has been applied here (f) though no provision is made in the Act. There is no distinction between a general and a demonstrative legacy so far as interest on the legacy is concerned (g).

Exception (1). This exception is based on a principle recognised long ago and thus laid down (h). "Where the Court decrees a legacy to be in satisfaction of a debt the Court gives interest always from the death of the testator." But if the debt be due to another person and not to be testator, interest runs after a year

- (a) *Lord v Lord*, 2 Ch. 782, *Re Willeley*, 25 T. L. R. 543.
(b) *Wood v Penoyre*, 13 Ves. 325, 333, 334.
(c) *Hertford v Lowther*, 9 Beav. 266, *Fisher v Brierley*, 330 Beav. 267, *Re Blachford*, 27 Ch. D. 276 W. 952, 12 Ed.
(d) *Webster v Hale*, 8 Ves. 410, 415; *Benson v Claude*, 6 Madd.

- 15 W. 952, 12 Ed.
(e) *Walford v. Walford*, 1912 A. C. 658.
(f) *Chinnam v Tadikonda*, 29 M. 155.
(g) *Adm. Genl v Christlana*, 43 C. 201; *Kudithipudi v. Kudithipudi*, 78 I. C. 274.
(h) *Clark v Sewell*, 3 Atk. 96, 93

from the testator's death (a) A legacy in lieu of a dower, however, carries interest from the end of a year after the testator's death (b) In *Rajamannar v Venkata* (c), interest at the rate of 6 p c from the testator's death was allowed on a legacy in satisfaction of a debt Whether a legacy is in satisfaction of a debt or not is a question of construction

Exception (2) In English law a legacy by a parent or testator standing in *loco parentis* to a child bears interest from the death of the testator, provided the child is an infant (d) As to the meaning of the expression *loco parentis*, (if in the position of the father) see the authorities cited below (e) Interest is allowed in such a case from the death of the testator because the Court considers the parent to be under an obligation to provide not only a future but a present maintenance for his child and therefore never meant to deprive him of the fruit of the legacy. A legacy from an uncle to a niece, to be paid at 21 or marriage, does not ordinarily carry interest before the time of payment (f)

Exception (3) Where there is a provision for maintenance out of the interest of a legacy the interest is payable from the testator's death otherwise there will be no fund for providing the maintenance It should be noticed that this sub section unlike the previous one does not require the testator to be a parent or person standing in *loco parentis* to the minor, in fact the testator may be a complete stranger or the child may be a natural child (g)

Minor The rule does not extend to a legacy to an adult child (h), nor to a legacy to a wife (i) nor to a legacy to a son payable on attaining 25 (j), nor to a legacy to an adult subject to an obligation to maintain minor children (k) But the rule applies when the infant is in its mother's womb when interest will run from the birth of the child (l)

In case of a vested legacy to an infant without any time fixed for its payment feasible upon a contingency the infant or his representatives will be entitled to the interest accrued due till the happening of the contingency (m) If the maintenance fixed by the testator be less than the interest upon the legacy, the larger sum cannot be claimed (n), but if the amount be not sufficient for the purpose for which it has been given the amount can be increased by Court, if the legacy be a vested one (o).

- (a) *Askew v Thompson* 4 K. & J 620, see *Shirl v Westby* 16 Ves 393
 (b) *Re Bignold* 45 Ch D 496
 (c) 25 M 361, 365 6
 (d) *Wilson v Maddison* 2 Y & C. C. C. 372
 (e) *Powys v Mansfield* 3 My & Cr 359, *Tucker v Barrow* 2 H & M 519, *Campbell v Campbell* 1 Eq. 383, *Ex p. Pyc* 18 Ves 140 W 869 12 Ed.
 (f) *Crickell v Dolby* 3 Ves. 10
 (g) *Newman v Bateson* 3 Sw 689

- (h) *Racen v Walle* 1 Swanst. 553, *Wall v Wall*, 15 Sim. 513
 (i) *Stent v Robinson* 12 Ves. 461, *Re Whittaker* 21 Ch D 657
 (j) *Re Abrahams* (1911) 1 Ch. 108 W. 953 4, 12 Ed
 (k) *Re Crane*, (1908) 1 Ch. 379
 (l) *Rawlins v Rawlins* 2 Cox. 425
 (m) *Barber v Barber* 3 My & Cr 658
 (n) *Hearle v Greendank* 3 Ark 695, *Re George* 5 Ch D 637
 (o) *Aynsworth v Platchell* 13 Ves. 321

352 (S. 312. P. 131). Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary.

1. The section The previous section contemplates a case where no time has been fixed for the payment of a general legacy, this section deals with a case where such time has been fixed by the testator. In the latter case the rule laid down in the section declares that the legatee is not entitled to interest till the legacy is payable, *i. e.*, the interest begins to run from the time fixed for the payment of the legacy (*a*). A legacy may be vested in interest but if a time has been fixed for its payment, *e. g.*, on the legatee attaining the age of 21, the legacy shall not carry interest in the absence of an intention to the contrary (*b*). Where legacies are given to several children on attaining a certain age and some of them attain that age during the testator's lifetime, the legacies to them carry interest not from the testator's death, but like ordinary legacies, from the end of a year after the testator's death (*c*).

2 Exception. The Exception relates to the case of a gift to a minor by a parent, or more remote ancestor, or a person standing in *loco parentis*, and there is no separate provision made for his maintenance or no direction to the contrary in the will (*d*). The infant legatee is allowed the interest from the testator's death by way of maintenance in the absence of any provision to that effect in the will (*e*). In *Jitu v Bindu* (*f*) a legacy to a grand-daughter was on her death before the testator, claimed by her daughter, held, the latter was entitled to it (under S. 109) with interest. In *re Ramsay* (*g*) the primary object of the gift was held to be to provide maintenance for minors though an adult was joined with them.

3 Where testator was not a parent, etc. In such a case interest does not run from the testator's death (*h*).

4 Unless a specific sum is given by the will for maintenance, etc Where the will provides for maintenance of a minor, interest begins to run from

- (a) *Re Churchill* (1909) 2 Ch 431.
Lloyd v Williams, 2 Atk 109.
Crickell v Dolby, 3 Ves 10.
Festling v Allen, 5 Hare 573.
(b) *Heath v Perry*, 3 Atk 101.
(c) *Re Palfreeman* (1914) 1 Ch 877.
(d) *Mill v Roberts*, 1 Russ & M 555.
Inledon v Northcote 3 Atk 438.
Donovan v Needham 9 Beav 164.
Re Bowby, (1904) 2 Ch 655.

- (e) *Chambers v Goldwin* 11 Ves 1.
Marlin v Marlin, 1 Eq 369.
Re Abrahams, (1911) 1 Ch 109.
(f) 16 C 549.
(g) (1917) 2 Ch 64.
(h) *Marlin v Marlin* 1 Eq 369.
Festling v Allen 5 Hare 573 579.
Re Cure (1917) 1 Ch 351 W.
934 936, 12 Ed.

the time the legacy becomes payable (a) Where maintenance is provided for a part of the infant's minority he will be entitled to interest during the rest (b) Where maintenance is directed to be paid to an infant then even if the legacy be contingent e.g. on the legatee attaining a particular age there arises an imperative trust to apply the income for maintenance if it be required and therefore interest runs from the testator's death though the testator be not a parent of or do not stand in loco parentis to the minor legatee (c)

5 Direction to the contrary A legacy to an infant as executor is payable on the infant attaining age and accepting the office and therefore interest on the legacy will not begin to run till then (d) A legacy to an infant on attaining majority with interest due thereon will carry interest from the end of the year after the testator's death (e)

353. (S. 313. P. 132) The rate of interest shall be four per cent per annum in all cases except when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, in which case it shall be six per cent per annum

The section In England also interest is allowed at 4 per cent and it is not enhanced by reference to the higher rate of interest allowed in the country where the testator was domiciled or where the fund was invested at the time of making the will (f) The interest will be simple (g) but under certain circumstances the Court will allow compound interest e.g. where there is an express direction in the will to that effect (h) or a direction that the executor should lay out the fund to accumulate and he neglects to do so (i) The rate of four per cent relates to interest payable by the executor (j)

354 (S. 314 P. 133) No interest is payable on the arrears of an annuity within first year after testator's death from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity

The section The section allows interest on arrears of annuities except for the first year for which period it is not payable even though the testator may have fixed a day for its payment within the year This is so because the

- (a) *Hearle v Greenbank* 3 Atk 695
716 *Re West* (1913) 2 Ch 345
345 *Re Churchill* (1909) 2 Ch 431
(b) *Re George* 5 Ch D 637
(c) *Chambers v Goldwin* 11 Ves 1, 1
Martin v Martin, 1 Eq 369
(d) *Re Richards* 8 Eq 119
Ch dgey v Whitby 41 L J Ch 699
M 691
(e) *Re Gardner* 67 L T 552
(f) *Knight v Knight* 2 Sim & Stu

- 490
(f) W 1162
(g) *Perkins v Baynton* 1 Bro C C 574
(h) *Arnold v Arnold* 2 My & K. 365
(i) *Raphael v Boehm*, 11 Ves. 92,
Knott v Collee 16 Bea 77
(j) *Panchugopal v Kalidas* 54 I C. 140 145

first payment in the absence of a direction to the contrary, is not due till the end of a year after the testator's death. In England Courts do not, as a rule, allow interest on arrears of annuities (a). In *Panchu v Kalidas* (b) interest at 12 per cent was allowed on arrears of an allowance payable to one of the sons of the testator out of the profits of immovable property, the allowance, however, was not an annuity as contemplated by this section.

355. (S. 315. P. 134). Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

Interest on sum to be invested to produce annuity

The English rule. A sum of money directed by the testator to be invested in the purchase of an annuity does not carry interest before the expiration of a year from the testator's death. Such a gift is considered as a legacy payable at the end of the year (c).

CHAPTER XII.

OF THE REFUNDING OF LEGACIES.

356. (S. 316. P. 135). When an executor or administrator has paid a legacy under the order of a Court, he is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

Refund of legacy paid under Courts orders

Change. The words 'or administrator' have been added and the word 'Court' has been substituted in place of the word 'Judge' occurring in S 316 of the Act of 1865.

The section. The general rule is stated in the next section. This section lays down what may be called an exception to that rule. Where payment to a legatee is not voluntary, but the legacy has been obtained by means of a suit, there the legatee may be called upon by the executor to refund the legacy on a deficiency of assets (d).

(a) *Hodgson v Deeltive*, 1 H & M 376. *Torr v Bruce* 5 H L C 555. *Taylor v Taylor*, 8 Hare 120

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357. (S 317. P. 136). When an executor or administrator has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No refund if paid voluntarily.

The section. The general rule is "that whenever an executor pays a legacy, the presumption is, that he has sufficient to pay all legacies, and the Court will oblige him, if solvent, to pay the rest, and not permit him to compel the legatee, whom he voluntarily paid, to refund (a) So also an executor who has severed a portion of the testator's estate in favour of two beneficiaries is not entitled to relief from the portion of one of the beneficiaries against a liability incurred in respect of the portion of the other beneficiary (b). Where by mistake an executor pays an annuity before it is due he is entitled to retain the amount so paid from future payments (c). Where income tax was not deducted from an annuity the executors were held entitled to retain the amount out of future payments of the annuity (d) But he cannot claim such adjustment in his own favour where he is the person responsible for the mistake (e)

358. (S. 318 P. 137). When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor or administrator has thereupon without fraud, distributed the assets; in such case, if further time has been allowed under section 137 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator, but those to whom he has paid it are liable to refund the amount.

Refund when legacy has become due on performance of condition within further time allowed under section 137

The section. The two previous sections deal with the distribution of assets in the case of assets proving insufficient to pay all the legacies and with the distribution of assets proving insufficient for the payment of debts and funeral expenses. This section deals with a conditional legacy where the condition has not been performed within the time prescribed by the will and the executor or administrator has distributed the assets but the time for the performance of the condition has not elapsed. In such case the legatee becomes entitled to the legacy if the condition is performed within the time allowed under section 137 and the executor or administrator is liable to refund the amount to those to whom he has paid it.

See also S. 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

359. (S 319 P. 138). When the executor or adminis-

When each lega-
tee compellable to
refund in proportion

trator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion

1 The section The section is based on the following passage in Williams (a), if the executor pays away the assets in legacies and *afterwards debts appear* of which he had no previous notice and which he is obliged to discharge he may compel the legatees to refund (b) But executors who have paid away assets in legacies with notice of a debt cannot recover from residuary legatees though creditors can obtain an order to refund against residuary legatees (c) In S 323 it is expressly provided that the executor's liability to pay debts extends to such debts as he knows of

2 Debts Mere liability is not enough there must be a debt Where there is no notice of a debt at the time of distribution of the residue the executor does not lose his right to recover from the residuary legatee So notice of a possible remote contingent liability which does not constitute an actual debt does not prevent the executor from distributing the residuary estate If after such distribution the liability ripens into debt the executor can call on the residuary legatees to refund (d)

3 The amount that can be recovered What the executor is entitled to recover is the capital sum which he has paid to the legatee without any intermediate income (e) together with costs charges and expenses incurred by the executor after paying away the residue (f)

4 Each legatee These words cannot mean that each and every legatee is liable to be called upon to refund It is only those legatees who are liable for debts that are to be so called upon Thus debts are primarily payable out of the residue then out of the general legacies which must abate and last of all out of specific legacies (S 327, 330 *sq*) Although an executor is entitled to call upon each legatee to refund in proportion it is submitted he is not entitled to call upon all of them but only in the order of their liability for the payment of debts

5 Limitation Where executors had assets but parted with them thereby rendering themselves incapable of meeting the claim of a creditor they being bound in equity properly to deal with the assets cannot plead their own wrong by way of *devastavit* as a defence in order to claim the benefit of the law of limitation (g)

360 (S. 320 P. 139) Where an executor or admini-

Distribution of
assets

strator has given such notices as the High Court may, by any general rule, prescribe or,

(a) See p 985 W 12 Ed
(b) *Doc v Guv* 3 East 120 123
(c) *Jerls v Wolferstan* 18 Eq 18
25
(d) *Jerls v Wolferstan* 18 Eq 18
W Hiltaker v Kenshaw 45 Ch D

320
(e) *Jerls v Wolferstan* 18 Eq 81
(f) *W Hiltaker v Kenshaw* 45 Ch D
320 330
(g) *Re Manden* 26 Ch D 763

if no such rule has been made, as the High Court would give in an administration-suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution :

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

1. Change The words "as the High Court may, by any general rule, prescribe" have been taken from the Act of 1881, and the words "as the High Court would give in an administration suit" from the Act of 1865 and the words connecting them, "or, if no such rule has been made" are new. In the proviso, the words "Provided that" have been substituted for the words "But"

2. The section This clause reproduces section 320 of the Act of 1865 and section 139 of the Act 1881 It would be preferable if the wording of section 139 had been adopted, but this would involve a slight change in the law"—Notes on Clauses

The section is based on statute 22 & 23 Vict c 35 S 29, Lord St Leonard's Act. Prior to the passing of this Statute no executor could safely distribute the assets of his testator except under the direction of the Court which involved great expense and frequently great delay This statute provided that an executor issuing certain advertisements might distribute the assets, and should not then be answerable for any more than he would have been if he had distributed them under the decree of Court The concluding portion of the Statute provides, as the doctrine of Court always did, for creditors who have not been satisfied, and reserves to persons who have claims, the existence of which was not known at the time, the right to resort to those persons to whom the assets have been handed over by the executor If the executor should have retained any legacies as trustee after appropriating them for the benefit of the *cestui que trusts* he would no longer be under any liability *qua* executor (a).

The section being in similar terms affords relief to an executor or administrator (from the claims of creditors) who has distributed assets after giving due notice on the expiration of the time mentioned therein and in ignorance of claims of which he had no notice. The creditors in such a case can proceed against persons who have received a share of the assets but not against the executor or administrator This immunity, however, does not extend to an executor who distributes

(a) *Clegg v Rowland*, 3 Eq 369. |

Hunter v. Young, 4 Ex. Div 256

the assets with notice of a claim, even though the claimant has failed to send in particulars in answer to the statutory advertisements (a).

There is no rule regulating where notices issued by executors to creditors asking them to come in and claim against the estate of the testator should be published and how much time should be allowed for the bringing in of claims, but each case should be determined with regard to the circumstances of the particular case such as the place of residence of the testator and his position in life (b).

3 **Proviso.** Mere delay does not prevent a creditor from asserting his equitable right to follow his deceased debtor's assets for payment of an existing debt (c) Though the time has elapsed the Court will let in creditors at any time while the fund is in Court (d)

4. **Creditors and others.** The word, 'others,' shows that the provisions of this section are not confined to the claims of creditors alone of the deceased but apply also to persons having claims as next of kin as has been held in England (e) In the form of notice prescribed by the High Court of Calcutta, however, the words 'and others' have been omitted, and creditors alone are asked to send to the Registrar particulars of their claims

361. (S 321. P. 140). A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor or administrator was voluntary or not

1. **The section** The old law in England was very strict It made an executor or administrator liable to a creditor for payments made to legatees or parties entitled on distribution in ignorance of the debt or claim of a creditor provided the assets were originally sufficient to meet the claims of creditors The hardship occasioned by that law has now been mitigated (f) and this section is intended for the relief of personal representatives in this country under similar circumstances The effect of the issue of a proper notice under the preceding section is to exonerate the executor from liability without in any way affecting the rights of creditors and others to follow the assets (g) This section declares the rights of creditors generally and is not confined to those who have not sent in their claims in time pursuant to the notice issued by the executor who can come in at any time It is immaterial whether the assets of the testator's estate were sufficient at the time of his death to meet the claims of both creditors and legatees and also whether the payment to the legatee proceeded against was voluntary or

(a) *Re Land Credit &c.*, 21 W. R. 135; *Re Kay* (1897) 2 Ch 518
See S 361 note.

(b) *Re Bracken*, 43 Ch D 1.

(c) *Re Gustace*, (1912) 1 Ch 361
W 937, 12 Ed

(d) *Lashley v Hogg* 11 Ver 622 fold in
Rose v Biddjurry 9 C. W. N

167
(e) *Newton v Sherry* 1 C P. D. 246 W 830 12 Ed

(f) *Norman v. Baldry* 6 Sim 621.
Knatchbull v. Fearnhead, 3 My & Cr 122

(g) *Clegg v Rowland* 3 Eq 368

not. If a creditor is not paid he has a right to follow the assets of the deceased whether they be specific legacies or whether they be of a different character, but this right has to be exercised by a suit and not merely by levying execution under O 21 r 63 C P Code (a)

A creditor's remedy lies against the executor and not the legatee. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man devised a remedy by which when the estate has been distributed either out of Court or in Court, without regard to the rights of a creditor, by allowing the creditor to recover back what has been paid to the beneficiaries or the next of kin (b). The right of the creditors is purely equitable in England (c) and so equitable defences may be raised against the claim *e g* laches, a quiescence (d).

The law is thus stated in *Williams* (e) and the following among other cases are cited in support. Where the testator's funds at the time of his death are not sufficient to pay both debts and legacies it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, whether the legacy was paid to him voluntarily or by compulsion (f)—the creditor may also be an executor yet he does not lose this right (g) and he has the same right although the testator's funds at the time of his death were sufficient to pay both debts and legacies (h), and although the assets were handed over to the legatee by the personal representative in ignorance of the creditor's demands (i). So where a bankrupt effected policies on his life and died intestate and his administrator distributed the policies among the next of kin it was held that the administrator was not personally liable but the next of kin must refund the money even though paid and received in good faith and without notice of the bankruptcy (j).

An unsatisfied creditor can follow the assets in the hands of a volunteer claiming through a legatee (k) but not in the hands of a bona fide purchaser for value or of a mortgagee (l) the reasons being that unsatisfied creditors have no lien or charge on any assets and that persons dealing with the executor in good faith are entitled to look to him alone and are not bound to ascertain that all debts and liabilities have been discharged (m). But where the executor has not parted control over assets or where the legacy is represented by a fund in court the

(a) *Jay v Salls* 34 C. W. N. 761 129 I C 419

(b) *Harrison v Kirk* 1904 A. C. 17

(c) *Blake v Gale* 32 Ch. D. 571

(d) *Ridgway v Newstead* 2 Giff 492 on app 30 L. J. Ch. 839

(e) *W 11 Ed* 986 7 12 Ed

(f) *Hodges v Waddington* 2 Vent 360, *Noel v Robinson* 1 Vern 90, *Gillespie v Alexander* 3 Russ C. C. 130, *Noble v Brett* 24 Beav 499; *Jerols v Wolferslan* 18 Eq 18 25

(g) *See Re Brogden* 33 Ch. D. 5-6
Hunter v Young 4 Ex. D. 255

(h) *Hodges v Waddington* 2 Vent 360
Thomas v Griffith 2 Giff 504

(i) *March v Russell* 3 My & Cr 31

(j) *Re Bennett* (1907) 1 K. B. 149

(k) *Dikes v Broadmead* 2 Giff 113

(l) *Spackman v Tumbrell* 8 Sim 253
Graham v Drummond (1896) 1 Ch 968, see *Noble v Brett* 24 Beav 499, c.f. *Bank of Bombay v Suleman* 12 C. W. N. 993

(m) *Graham v Drummond* (1896) 1 Ch 938

purchaser from the legatee takes subject to the rights of the unsatisfied creditors though their claims be established after purchase" (a)

2 Amount that can be recovered The creditor is entitled to recover the entire amount of his debts from one legatee (b) The legatee is entitled to contribution from his co legatees (c)

3 Limitation The period of limitation for a claim for refund against the legatee is 3 years from the date of payment or distribution (Art 43 Act IX of 1908)

4 Position of creditors of an estate under administration by Court The general principle governing their position as laid down in *Rose v Biddadbury* (d) is that creditors will, on due cause shewn, be let in at any time while the fund is in court (e) and that even where the money has been apportioned amongst the creditors and transferred to the Accountant General for payment to them (f) The effect of the proceedings in an administration suit was clearly explained in *David v Frowd* (g) If there be no wilful default a creditor coming in afterwards will succeed in establishing his case and there will be rateable apportionment among creditors without preference or priority But the default of a creditor guilty of remissness in the assertion of his claim will not be allowed to operate to the prejudice or inconvenience of others more diligent than himself (h) The legal position of a creditor who for some reason or other has been excluded from a first dividend and later on has his claim admitted to the Schedule so as not to disturb past dividends is that if further assets come in he is entitled to have a preferential dividend paid to him out of such assets before any further dividend is paid to others (i)

362 (S. 322 P. 141) If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under section 361, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor

The section This and the following sections deal with the right of a legatee to claim refund from other legatees This section applies where the assets at the time of the testator's death were sufficient to satisfy all the legatees and the deficiency arises subsequent to the payment of a legatee or legatees This will appear clear from the following statement of the law in *Lunwick v Clarke* (j) —

- (a) *Noble v Brett* 24 Beav 499,
Hooper v Smart 1 Ch D 90
 H XIV 230 W 928 12 Ed
 (b) *Dacles v Nicholson* 2 D G & J
 693
 (c) *Dacles v Nicholson*, 2 D G. & J
 693, see *Northington Co Ltd v*
Abbott (1910) 1 Ch 528
 d 9 C W N 167

- (e) *Lashley v Hogg* 11 Ves 692,
Hartwell v Colclm 16 Beav 140
 (f) *Angell v Haddon* 1 Madd 529
 (g) *1 My & K* 200
 (h) *Callell v Simons*, 8 Beav 243 refd
 to
 (i) *Snee v Prescott* 1 Atk 246
 (j) 31 L J Ch 728

Where assets are originally sufficient to pay all legacies, unpaid legatees have no right to call upon the satisfied legatees for the contribution of the loss occurred in consequence of a *devastavit* by the executor and *a fortiori* there can be no such right when the loss has occurred, not by the conduct of the executor, but from merely accidental circumstances. The following extract from Roper on Legacies (a) is cited in the judgment — 'If the assets be originally sufficient to satisfy all the legacies, and one of the legatees procures from the executor, either by means of or without a suit payment of his legacy, and afterwards the executor wastes the estate so as to render it deficient to discharge the remaining bequests, those legatees cannot oblige the satisfied legatee to refund, first, because the payment was not a *devastavit* by the executor, and secondly, because the legatee is protected by the principle that *vigilantibus non dormientibus jura subveniunt*—Law assists the vigilant and not those who sleep over their rights

Residuary legatees. Where a residuary legatee has received his share, a subsequent wasting of the assets by the executor will not entitle the other residuary legatees to call upon him to refund but the case is materially altered if the executor has dissipated a portion of the assets before he has paid any of the residuary legatees. The rule in such a case ought to be that what is available at the time should be equally divisible amongst all the residuary legatees but the burden lies upon those who call upon one residuary legatee to refund to show that payment was made in excess and that the wasting took place before the share was paid over (b)

363 (S 323. P. 142). If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor or administrator if he is solvent; but if the executor or administrator is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion

The section Sections 356—359 deal with the right of the executor to claim a refund S 361 deals with the right of a creditor and S 362 363 deal with the right of a legatee. The previous section exonerates a satisfied legatee from liability to refund in respect of a claim by another legatee if the assets were originally sufficient to satisfy the claims of all legatees, whereas this section states that if the assets were not sufficient an unsatisfied legatee must first proceed against the personal representative, if solvent, but if he be insolvent or not liable to pay, he can oblige each satisfied legatee to refund in proportion (S 364). One legatee, therefore, can not proceed against another where the assets were originally sufficient to satisfy all legatees, or, though the assets were deficient, the executor is solvent. It is where the executor is insolvent or not liable to pay that the unsatisfied legatee can c

(a) Vol. 1 p. 459

(b) *Peterson v Peterson* 3 Eq 111.*Re Bales*, 45 Ch. D 2

upon a satisfied legatee to refund. The reason why the personal representative is made primarily liable in such a case is that payment to a legatee is an admission of the sufficiency of assets to pay all (a). Upon a deficiency of assets it is the duty of the personal representative to pay all legatees in equal proportion so if he pays one legatee in full, the rest can call upon the legatee to refund it in proportion and the case is the same if the legatee realises the legacy by suit. But the case is different where the executor had at first enough assets to pay all (b). A residuary legatee who brought a suit for administration and had been overpaid by the executor before suit was compelled by the Court to refund, though the action was brought 25 years after the testator's death in order to meet the claim of a legatee (c),

364. (S 324 P. 143) The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Illustration

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

Properly administered This expression means proportionately paid distribution of assets in proportion to the amounts of legacies.

365. (S 325 P. 144) The refunding shall in all cases be without interest.

No interest on refund Where a legatee has been ordered to refund, either in respect of a pecuniary legacy or in respect of a share of the residue, such refunding is without interest (d). If the legatee is entitled to another fund in the hands of the Court on which interest is accruing, then he may be called upon to refund with interest (e). In *re West* (f) a refund of a specific legacy was ordered with the mesne income from a person to whom it was made over but who was not entitled to it.

- (a) *On v. Kalnes* 2 Ves Sen 194
see *Fenwick v. Clarke* 4 D G & J 240
- (b) *Anonymous Case* 1 P W 495
see *Balcott v. Holl* 1 P W 494
n. *Gillespie v. Alexander* 3 Russ. C. C. 130, *David v. Frowd*, 1 M & K. 200 S 362

- (c) *Prowse v. Spurgin* 5 Eq 99,
see *Re Rices* (1920) 1 Ch 320
- (d) *Gillins v. Steele* 1 Swanst 200,
Jenls v. Wolfentan 18 Eq 18
- (e) *Gillins v. Steele*, 1 Swanst 24
- (f) (1907) 2 Ch 180

366. (S. 326. P. 145). The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

Residue after usual payments to be paid to residuary legatee.

1. The section. The combined effect of Ss 337 and 366 is that a residuary legatee becomes entitled to the residue after the executors have paid the testator's debts and legacies, on the expiration of a year from the testator's death. On the expiration of that year, the moment the estate is liquidated, the legatees can insist upon being paid, the moment debts and legacies have been paid, the residuary legatee becomes entitled to the residue (a). "A residuary legatee (therefore) has a right to insist that, in the course of the first year after the testator's death, the executor shall, if it be possible, pay the debts, legacies and funeral and testamentary expenses, so that the clear residue may be ascertained and paid over to him, or if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled. In order to effect this object, it is the duty of the executor to sell the personal estate, or, at all events, so much of it as is required for the payment of debts, legacies, and funeral and testamentary expenses, and if from any cause it has been impossible to ascertain the clear residue at the end of the year, still it is from that date the right of those entitled to life interests in it commences, and, therefore, when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively what was the residue at the end of the year, attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest" (b).

A residuary legatee does not become the proprietor of the estate until the administration has been completed and the residue ascertained and made over by the executor to him (c). Thus a bequest of one fourth part of the residuary estate does not vest in the residuary legatees a fourth part of each asset of which the estate consists, but their right consists in requiring the executor to complete the administration and have the residuary estate ascertained and realised, either wholly or so far as may be necessary for the purpose, and to have one fourth part of the proceeds paid to them. The residuary legatees may no doubt agree between themselves to take any portion of the estate in specie (d), or an appropriation made of particular portions of the estate in satisfaction of any share by any agreement between the executors and residuary legatees (e). A residuary devise passes the reversion of lands in which partial interests have been given by the will, even though there are directions in the will inappropriate to the lands devised (f). The interest of a residuary legatee is a vested interest, though such a legatee does

(a) *Macleod v Sorabji*, 7 Bom. L. R. 755

(b) *Whitwick v Lord*, 6 H. L. C. 217, 226.

(c) *Canada v Nalini*, 36 C. 28, 12 C. W. N. 1065, 1073

(d) *Re Beverley*, (1901) 1 Ch. 681 (see cases *reft* to).

(e) *Sudeley v All Gent*, 1897 A. C. 11

(f) *Lim Teck v Wee Hum*, 61 M. L. J. 102; 131 I. C. 305 P. C.

upon a satisfied legatee to refund. The reason why the personal representative is made primarily liable in such a case is that payment to a legatee is an admission of the sufficiency of assets to pay all (a). Upon a deficiency of assets it is the duty of the personal representative to pay all legatees in equal proportion, so if he pays one legatee in full, the rest can call upon the legatee to refund it in proportion and the case is the same if the legatee realises the legacy by suit. But the case is different where the executor had at first enough assets to pay all (b). A residuary legatee who brought a suit for administration and had been overpaid by the executor before suit was compelled by the Court to refund, though the action was brought 25 years after the testator's death, in order to meet the claim of a legatee (c),

364. (S. 324 P. 143). The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Illustration

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

Properly administered. This expression means proportionately paid, i.e., distribution of assets in proportion to the amounts of legacies.

365. (S. 325 P. 144). The refunding shall in all cases be without interest.

No interest on refund. Where a legatee has been ordered to refund, either in respect of a pecuniary legacy or in respect of a share of the residue, such refunding is without interest (d). If the legatee is entitled to another fund in the hands of the Court on which interest is accruing, then he may be called upon to refund with interest (e). In *re West* (f) a refund of a specific legacy was ordered with the same income from a person to whom it was made over but who was not entitled to it.

(a) *On v. Kaines* 2 Ves Sen 194, see *Fenwick v. Clarke*, 4 D G & J 240.

(b) *Anonymous Case* 1 P W 495, see *Walcott v. Hall*, 1 P W 494; n. *Gillepie v. Alexander* 3 Russ C C 130, *David v. Iredale*, 1 M & L 200 S 362.

(c) *Prowse v. Spurgin* 5 Eq 99, see *Re Rices*, (1920) 1 Ch 320.

(d) *Gillies v. Steele* 1 Swanst 200, *Jenks v. Woffeston*, 18 Lj 18.

(e) *Gillies v. Steele*, 1 Swanst 24, 200.

(f) (1907) 2 Ch 180.

366. (S. 326 P. 145). The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will

Residue after
usual payments to
be paid to residuary
legatee

1 The section The combined effect of Ss 337 and 366 is that a residuary legatee becomes entitled to the residue after the executors have paid the testator's debts and legacies on the expiration of a year from the testator's death. On the expiration of that year the moment the estate is liquidated the legatees can insist upon being paid the moment debts and legacies have been paid, the residuary legatee becomes entitled to the residue (a) 'A residuary legatee (therefore) has a right to insist that in the course of the first year after the testator's death the executor shall if it be possible, pay the debts legacies and funeral and testamentary expenses so that the clear residue may be ascertained and paid over to him or if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled. In order to effect this object, it is the duty of the executor to sell the personal estate, or, at all events so much of it as is required for the payment of debts, legacies, and funeral and testamentary expenses and if from any cause it has been impossible to ascertain the clear residue at the end of the year still it is from that date the right of those entitled to life interests in it commences and, therefore, when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively what was the residue at the end of the year, attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest (b)

A residuary legatee does not become the proprietor of the estate until the administration has been completed and the residue ascertained and made over by the executor to him (c). Thus a bequest of one fourth part of the residuary estate does not vest in the residuary legatees a fourth part of each asset of which the estate consists, but their right consists in requiring the executor to complete the administration and have the residuary estate ascertained and realised, either wholly or so far as may be necessary for the purpose, and to have one fourth part of the proceeds paid to them. The residuary legatees may no doubt agree between themselves to take any portion of the estate in specie (d) or an appropriation made of particular portions of the estate in satisfaction of any share by any agreement between the executors and residuary legatees (e). A residuary devise passes the reversion of lands in which partial interests have been given by the will, even though there are directions in the will inappropriate to the lands devised (f). The interest of a residuary legatee is a vested interest, though such a legatee does

(a) *MacLeod v Sorahji* 7 Bom. L. R. 755

(b) *Highwick v Lord* 6 H. L. C. 217, 226.

(c) *Canada v Valin* 36 C. 28, 12 C. W. N. 1065, 1073

(d) *Re Beccley* (1901) 1 Ch. 651 (see cases cited to).

(e) *Sadeley v All Genl.*, 1897 A. C. 11

(f) *Lim Teck v Wee Hum*, 61 M. L. J. 102, 131 I. C. 305 P. C.

not become a proprietor until after the administration has been completed and the residue ascertained and made over to him (a)

2 After payment of debts, etc No definite time is fixed, for the payment of the residuary legacy. Indeed it can not be fixed for it will vary according to the nature of each particular estate. Therefore it is said that such a legacy is to be paid after the payment of debts and legacies. Under S 337 a legacy is not payable until after the end of a year from the testator's death. Naturally a residuary legatee can not insist upon payment within the year (b). If the executor has not converted the assets at the end of the year, he must justify the delay (c). Where they have neglected to realise assets, which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular circumstances of each case (d).

3 Conversion and transfer. How the surplus is to be paid 'Where there is a trust for sale and conversion it is competent to the executor and trustee to agree with a person who is entitled to a share in the proceeds of the conversion to transfer to him the property, without converting it, in satisfaction *pro tanto* of the money which would be coming to him if he had converted it. It is not necessary to go through the form first of converting the property and then giving the beneficiary the money' (e). As to the appropriation of authorised investments, see the authorities cited below (f).

'Where there is no trust or duty to convert, but simply a gift of property among certain persons, it was held the executors might appropriate specific assets to a trust share of residue or transfer them to the legatee of a share in advance of final division' (g). It is not necessary for the executor to turn all the assets into money. An estate is liquidated when it is reduced into possession, cleared of debts and other immediate outgoings, and so left free for enjoyment by the heirs (h).

Executor and trustee "It is quite true that for many purposes an executor in certain circumstances is deemed to be or become a trustee but an executor does not cease to be an executor as soon as the debts, pecuniary legacies and funeral and testamentary expenses are paid or discharged especially if the residue be not ascertained and distributed" (i). 'For the most part the executorial duties consist in ascertaining the proper nett amount of the various parts of the testator's property, after payment of debts and expenses and distributing them among the persons entitled', executors may be appointed as trustees or become trustees when they receive or retain as trustees in trust

(a) *Manindra v Ganesh* 130 1 C 163

(b) See above

(c) *Grayburn v Clarkson* 3 Ch 605

(d) *Hughes v Eason* 22 Beav 181

(e) *Re Beechley* (1901) 1 Ch 681,
Re Hall (1903) 2 Ch 226, *Re Lapine* (1892) 1 Ch 210

(f) *Re Marshall*, (1914) 1 Ch. 192,
Re Craven, (1914) 1 Ch 358
W. 991 2, 12 Ed.

(g) *Re Richardson* (1896) 1 Ch 512,
see *Re Brooks* 76 L. T. 771.

Re Nichols (1898) 1 Ch 630.

Re Craven (1914) 1 Ch 358
W 991, 12 Ed.

(h) *Heirs Hiddingh, The v De Beaucourt*,
12 A. C. 624 cited in *MacLeod v Sorabji*, 7 Bom L. R 755

(i) *Solomon v Allentorough* (1911) 2
Ch 159 on app. (1912) 1 Ch
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for others the fund ascertained by themselves (a). Where funds have been ascertained and set apart there is a merger of the character of the executor in the character of the trustee, the ascertained funds in the hands of the executor may be treated as a trust fund for the benefit of the *cestui que trust*; but where the residue has been ascertained, it is impossible to fix on the executor the character of a trustee of a specific fund (b). Where the executors paid the debts and legacies and purchased stock to answer the annuity and paid the dividends to the widow, *held*, they were trustees of the stock (c), so also where they invested the residue upon the trust of the will (d).

"There are few things more difficult than to determine when an executor ceases to have duties *qua executor* or *virtute officii*. It is extremely difficult to draw the line, even when the facts are fully ascertained". The ordinary duty of an executor is to pay the debts, funeral and testamentary expenses, and when that is done he has done all that is necessary, and though he still remains executor he has done his duty and is *functus officio* and if he still retain any fund in his hands it is held by him as trustee (e); and the proper remedy for a legatee is a suit in a Civil Court for the construction of the will and the administration of the estate (f).

367. (S. 326A. P. 145A). Where a person not having his domicile in British India has died leaving assets both in British India and in the country in which he had his domicile at the time of his death, and there has been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 360, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

The section The section was added to the Acts of 1865 and 1891 by Act II of 1890, S. 9. See Administrator General's Act III of 1913 S. 32.

- (a) *Brougham (Lord) v. Poulett*, 19 Beav. 119, 134; see *Byrchall v. Bradford*, 6 Madd. 13, 235. W. 922, 12 Ed.
(b) *Dacentport v. Stafford*, 14 Beav. 319.

- (c) *Ex. p. Doer*, 5 Sim. 500.
(d) *Ex. p. Wilkinson*, 3 M. & A. 145.
(e) *Re Timmins*, (1902) 1 Ch. 176.
(f) *Nandkishore v. Pasupathi*, 7 C. 396.

Professor Dicey observes (a) — 'When the deceased dies domiciled in a foreign country *e.g.* Victoria, the English administrator (who must in this case be an ancillary administrator) should, after payment of all debts and other claims proved in England, hand over the distributable residue to the personal representative of the deceased under the law of Victoria. This course is open to the English administrator (b). The English administrator cannot rightly or safely undertake on his own responsibility to distribute the surplus among the persons entitled thereto under the law of Victoria and unless he takes the direction of Court this is his only safe course."

The Court may at its discretion adopt either of two different methods of distribution. The Court may, on the one hand, hand over the distributable residue to the personal representative of the deceased under the law of his domicile, and leave to such representative the distribution thereof among the beneficiaries. If this course is taken, all persons who, whether as next of kin or otherwise claim a share in the deceased's estate, must enforce their claims before the tribunals of his domicile (c). The Court may, on the other hand, determine for itself what is the law of the deceased owner's domicile and who are the persons who in accordance with such law, are entitled to succeed to the deceased's movables and, having determined this, distribute in accordance with such law, the distributable residue remaining in the hands of the English administrators (d).

Mode of administration With regard to the mode of administration Prof Dicey has laid down the following rule (191) — The administration of a deceased person's movables is governed wholly by the law of the country where the administrator acts, and from which he derives his authority to collect them, *i.e.*, in effect, by the law of the country where the administration takes place (*lex fori*). Such administration is not affected by the domicile of the deceased. In this rule the term "administration" does not include the "distribution."

Assets With regard to the movable and immovable properties that may be transferred to the personal representative of the country of domicile under a grant in England under circumstances such as those contemplated by this section, Prof Dicey thus enumerates them (rule 87) — (1) any property (movable or immovable) of the deceased which at the time of his death is locally situate in England, (2) any movables of the deceased, or the proceeds of any property of the deceased, which, though not situate in England at the time of the death of the deceased, are received, recovered, or otherwise reduced into

(a) Conflict of Laws 3rd Ed Rule 192 p. 713 715

(b) *Games v Hacon*, 16 Ch. D. 407, 18 Ch. D. 347, *Re Kloebe*, 28 Ch. D. 175, *D. Mora v Concha* 29 Ch. D. 268, *Re Trufort*, 36 Ch. D. 600 611, *Re De Penny*, (1871) 2 Ch. 63, 69, *Erving v Orr Erving* 10 A. C. 453, 502 4, 509 510 463, 464 note *Westlake*, Private International Law S. 105 W. 1050 sq. 12 Ed. Story, S. 528 529

(c) *Enghin v Wylie*, 10 H. L. C. 1 13, 14, *Erving v Orr Erving* 9 A. C. 34, 39 10 A. C. 453, 502 504 Cf *Westlake* S. 106 cit. 22 *Weatherill v St Giorgio* 2 Hare 624, *Melkian v Campbell* 24 Beav. 100, *Innes v Mitchell* 1 D. G. & J. 423

(d) *Enghin v Wylie*, 10 H. L. C. 1 19, 23, 24, *Erving v Orr Erving* 9 A. C. 34 39 see *Re Bonnesfort* 1912 P. 233

possession by the English administrator as such administrator, (3) any movables of the deceased which after his death are brought into England before any person has, in a foreign country where they are situate, obtained a good title thereto under the law of such foreign country (*lex situs*) and reduced them into possession."

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

368. (S. 327. P. 146). When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Illustrations

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(ii) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(iii) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

1. Devastation. Devastation, or the term used in this connection in English law, viz. *devastavit*, means a waste of the assets and mismanagement of the estate and effects of the deceased because the executors or administrators have squandered and misapplied a portion of the assets contrary to the duty imposed upon them. In such a case they are answerable as for wilful default (a). This liability arises from three sources, two of which are specified in this section viz. (1) where there has been misapplication of the estate which may be due to lack of adequate precaution or of proper knowledge of law and (2) from the doing of an act amounting to an abuse of the powers of the representatives and of the effects of the deceased which act occasions loss or damage to the estate. There is no devastation, however, of which the next of kin can complain where he concurs in it or acquiesces in it with full knowledge of the facts (b). An executor is not necessarily liable for

(a) *Saiga v Saiga*, 10 C. L. J. 523
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(b) *Arakshi v Vambanath*, 12 Bom.

L. R. 33, *Jones v Higgs* 2
Eq. 536

will at a fair value of a part of the decedent's estate to pay off his liabilities when no money could be raised on inventory. . .

The liability of an executor for "devastavit" is founded upon two principles: first, that in order not to draw persons from undertaking these offices, the Court is extremely liberal in making every possible allowance, and secondly not to hold executors or administrators liable upon slight grounds; second, that care must be taken to guard against an abuse of their trust. . .

An executor or administrator is considered in a Court of Equity as a trustee, though he is not an ordinary trustee nor an express trustee of the legatee. But he is a trustee for the purpose of administration of the estate, i.e. for the purpose of payment of debts and funeral charges and for the distribution of the estate. . . Therefore he is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office (1). But he is protected when, without any misfeiture of fact, he pays the residue to a wrong person under the express authority of the rightful person given with full knowledge of the facts (2). He is bound to account to all persons interested in the due and proper administration of the estate (3).

2. Misapplication which makes an executor liable for devastation. An executor or administrator is liable for devastavit if he misapplies the assets, e.g. (1) by paying excessive sums for funeral expenses (2) by paying a debt of a lower degree with notice and to the prejudice of debts of a superior degree (3) (S. 322 *sup.*). (4) by paying legacies before discharging debts when there is a deficiency of assets (5). (6) by carrying on the business of the testator when not authorized by the testator (7). (8) by paying to a legatee a larger sum than is warranted by the existing state of the assets but not where the deficiency arises on account of a subsequent decrease in the value of the assets (or . . .) (9) by compounding or releasing a debt unless this appears to have been done for the benefit of the estate (10).

3. Liability for abuse of powers. A representative is liable (1) if he apply the assets of the deceased to satisfy his own personal debts to a third

(1) *Updegr v. Simpson*, 32 L. C. 257.

(2) *W. 1175-9*, 12 Ed. edit. *Pratt v. Grant*, 5 Ves. 559; *Reid v. Smith*, 13 Ves. 47; *Tell v. Gorton*, 1 Madd. 290.

(3) *Oceanic Steam Co. v. Solicitors*, 15 Ch. D. 235, 243-4.

(4) *Bonds v. Gorton*, 13 C. W. N. 557.

(5) *Oceanic Steam Co. v. Solicitors*, 15 Ch. D. 235.

(6) *Re Mendon*, 25 Ch. D. 753. *Adair v. Marchant*, 12 Bos. L. R. 53; *Reyn v. Ingham*, 3 Ch. D. 351 *reid on: Ingham v. Pitt*, 5 Cl. & F. 562, 552 *reid*

(7) *Adair v. Marchant*, 12 Bos. L. R. 53.

(8) *Singapore v. Singapore*, 4 Dow 235.

(9) *Scott v. Carr*, 10 Ves. 404.

(10) *Re Mendon*, 25 Ch. D. 753. *see* S. 323.

(11) *Dow v. Gorton*, 1671 A. C. 197, 199; *Re Mendon*, 72 L. T. 823.

(12) *Scott v. Gorton*, 45 C. 535.

(13) *Lloyd v. Lloyd*, 23 W. R. 757.

(14) *Scott v. Mendon*, 3 P. W. 351; *Abraham v. Homers*, 17 B. 637.



sale at a fair value of a part of the testator's estate to pay off his liabilities where no money could be raised on interest (a).

The liability of an executor for devastavit "is founded upon two principles: first, that in order not to deter persons from undertaking those offices, (the Court) is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds: second, that care must be taken to guard against an abuse of their trust" (b)

An executor or administrator is considered in a Court of Equity as a trustee, though he is not an ordinary trustee (c) or an express trustee (d) for a legatee. But he is a trustee for the purpose of administration of the estate, i.e. for the purpose of payment of debts and funeral charges and for the distribution of the estate (e). Therefore he is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office (f). But he is protected when, without any mistake of fact, he pays the residue to a wrong person under the express authority of the rightful person given with full knowledge of the facts (g). He is bound to account to all persons interested in the due and proper administration of the estate (h).

2 Misapplication which makes an executor liable for devastatation. An executor or administrator is liable for devastavit if he misapplies the assets, e.g., (1) by paying excessive sums for funeral expenses (i), (2) by paying a debt of a lower degree with notice and to the prejudice of debts of a superior degree (j) (S 322 *sq.*), (3) by paying legacies before discharging debts when there is a deficiency of assets (k), (4) by carrying on the business of the testator when not authorised by the testator (l), (5) by paying to a legatee a larger sum than is warranted by the existing state of the assets but not where the deficiency arises on account of a subsequent decrease in the value of the assets (m), (6) by compounding or releasing a debt unless this appears to have been done for the benefit of the estate (n).

3 Liability for abuse of powers. A representative is liable (1) if he apply the assets of the deceased to satisfy his own personal debts to a third

(a) *Upendra v Bhupendra*, 32 I. C. 267

(b) W. 1178 9, 12 Ed. citing *Powell v. Evans*, 5 Ves. 839; *Raphael v. Boehm*, 13 Ves. 417; *Tells v. Carpenter* 1 Madd. 290

(c) *Oceanic Steam v. Sutherland*, 16 Ch. D. 236, 243-4

(d) *Baraja v. Gajendra*, 13 C. W. N. 557

(e) *Oceanic Steam &c v. Sutherland*, 16 Ch. D. 235

(f) *Re Mansden*, 26 Ch. D. 783

(g) *Ardesht v. Manchershaw*, 12 Bom. L. R. 53; *Rogers v. Ingram* 3 Ch. D. 351 relied on; *Higgin v. Pike*, 8 Cl. & F. 562, 652 relied

on
(h) *Ardesht v. Manchershaw*, 12 Bom. L. R. 53

(i) *Stackpole v. Stackpole*, 4 Dow. 209

(j) *Atlantic Banking Corp. v. Amador* 8 B. H. C. R. O. C. 20

(k) *Re Mansden*, 26 Ch. D. 783 see S. 325

(l) *Dowse v. Gorton* 1891 A. C. 197, 199; *Re Millard*, 72 L. T. 823.

Sudhir v. Gobinda, 45 C. 538

(m) *Floyd v. Lloyd* 23 W. R. 787.

(n) *Blue v. Marshall*, 3 P. W. 351, *Khushruhal v. Homaista* 17 B. 637.

party (a) or otherwise misappropriates it (b), (2) if he collusively sell the testator's goods at undervalue (c) (3) if he apply the assets in payment of a claim which he is not bound to satisfy, *e g*, in respect of services voluntarily rendered (d) or a bond on a usurious contract (e) or a joint liability discharged by the death of the testator (f). (4) if he risk the funds of an estate by mixing them with his own and employ them for his own purposes even temporarily (g) (5) if property in the possession of an executor has not been accounted for (h) (6) by allowing interest to run on a claim when he has assets in hands to satisfy it (i)

4 Devastavit by co executor In *Styles v Guy* (j) the law is thus set forth in the earlier cases it is laid down that a devastavit by one of two executors shall not charge his companion provided he has not intentionally contributed to it but later authorities show that passiveness will in many cases furnish no protection, but that negligence and inattention in not interfering with and taking proper measures to prevent or correct the improper conduct of the co executor may subject him to responsibilities (l) Therefore, it is the duty of all executors to watch over and, if necessary, to correct the conduct of each other, and an executor who stands by and sees a breach of trust committed by his co executor becomes responsible for that breach of trust (l) Thus where an executor unnecessarily does an act which enables his co executor to obtain sole possession of money belonging to the testator's estate, and this money is afterwards misapplied the executor who thus enables his co executor to obtain possession of the money is liable to make good the loss (m) so also where an executor unnecessarily hands over assets to his co-executor (n) But he will be exonerated where there is necessity, *e g* the act is done in the usual course of business (o) The words 'any act' mean any act done unnecessarily, *i e*, other wise than in the due course of business in the administration of the estate (p)

An executor will also be liable for the devastavit of his co executor if he allows the co executor to act in a certain manner and thereby to come into possession of

- (a) *Nugent v Gifford* 1 Atk 463
- (b) *Nagaratnammal v Namasaya* 5 I C 832 7 M L T 123
- (c) *Rice v Gordon* 11 Beav 265
- (d) *Midgley v Midgley* (1893) 3 Ch 282
- (e) *Robinson v Gee* 1 Ves. Sen 254
- (f) *Godson v Good* 2 Marsh 300, see *White v Tyndall* 13 A C 263 269
- (g) *Re Cowie* 6 C 70 M 905
- (h) *Aga Mahomed v Meerza Ally* 4 W R P C 106
- (i) *Bate v Robins* 32 Beav 73
- (j) 1 Mac & G. 422 435, *Langford v Gascoyne* 11 Ves. 333
- (k) *Horton v Brocklehurst* 29 Beav 504
- (l) *Styles v Guy* 1 Mac. & G. 422
- (m) *Horton v Brocklehurst* 29 Beav

- 504, *Staya v Satja* 10 C. L. J 503 3 I C 247 (see cases cited to) *Re Gasquoigne* (1894) 1 Ch. 470, *Booth v Booth* 1 Beav 125
- (m) *Chandler v Tillet*, 22 Beav 257 263, *Re Gasquoigne*, (1894) 1 Ch 470 See S 369
- (n) *Lincoln v Wright* 4 Beav 427.
- (o) *Clough v Bond* 3 My & Cr 490 497 cited in *Re Gasquoigne* (1894) 1 Ch (470), *Spelgt v Gaunt* 22 Ch D 727 744 (executor in India remitting money to co executor in England), *Chambers v Minchin* 7 Ves 186, *Churchill v Hobson* 1 P W 241 (executor not liable because he did not act imprudently in paying money to his co-executor who was a banker)
- (p) *Re Gasquoigne* (1894) 1 Ch 470

assets (a), or to act as managing administrator (b), or they divide the work among themselves and each manages a part of the estate (c), or where he relies on the representation of his co-executor without any inquiry (d) An executor is not protected in such cases by an indemnity clause in the will absolving him from liability for acts of his co-executors (e), unless special indemnity has been granted to meet such a case (f)

The general rule is no doubt that trustees and executors are not chargeable with each other's defaults (g) Thus if one of several executors receives part of the testator's property, ordinarily he alone is answerable for it and his co-executors are not liable (h) Thus an executor is not liable who has no knowledge of the existence of a debt when his co-executor with such knowledge pays an inferior debt (i) But the benefit of this rule is denied to a trustee or executor who has been guilty of negligence (j) The law requires of trustees an active and vigilant prudence A trustee is called upon even if a breach of trust is threatened to prevent it by obtaining injunction (k) The standard of a trustee's or executor's duty has been held to be that of an ordinary prudent man of business in the conduct of his own and beyond that there is no liability or obligation on the trustee (l) This has been explained to mean the duty to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide (m) When one of several executors contracts a debt, for goods apparently supplied to the estate, he is personally liable for it (n)

5 Employment of agent Trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as persons acting with reasonable care and prudence in conducting business of a like nature on their own account would conduct through agents (o) The same rule applies where a co-trustee is employed as a broker and paid as such under the terms of the will (p) A trustee, and therefore an executor also, will be liable even if he act honestly when he shows lack of diligence in the employment and super-

- (a) *Burrows v Walls*, 5 D G M & G 233
- (b) *Lees v Sanderson* 4 Sim 82
- (c) *Lewis v Nobbs* 8 Ch. D 591
- (d) *Shipbrook v Lord Hinchinbrook* 11 Ves 254 16 Ves 477 *Hewett v Foster*, 6 Beav 259, *Broadhurst v Balguy* 1 Y. & C C C 16, W 1195 1195
- (e) *Hanbury v Attkland* 3 Sim 265, *Brumbridge v Brumbridge*, 27 Beav 5
- (f) *Wilkins v Hogg* 3 Giff 116 W. 1191 sq., 12 Ed
- (g) *Barnard v Bagshaw* 3 D J & S 355
- (h) *De v Burford* 19 Beav 409
- (i) *Hawkins v Day* Amb 162. W 1195 12 Ed
- (j) *Hartley v Attkland* 3 Sim 263;

- Wilkins v Hogg* 8 Jur. N S 25 See S 26 Indian Trusts Act.
- (k) *Re Cherlsey Market*, 6 Price 279 cited in *Mahmood v Rodrigues* 7 Bom L R 691 (where the law is fully discussed).
- (l) *Spelght v Gaunt*, 22 Ch. D 727, reversed 9 A C. 1
- (m) *Re Witley* 33 Ch. D 347, 355
- (n) *Debendra v Hem* 31 C. 263 *Fathall v Fathall*, 7 Ch. 123, *Labouchere v Tupper*, 11 Moo P. C. C. 193 relied on
- (o) *Spelght v Gaunt*, 9 A C 1 (effect of a clause in a will empowering executors to employ agents considered). *Re Mackay*, (1911) 1 Ch. 300
- (p) *Shepherd v Harris* (1933) 2 Ch 310

vision of the agent because he fails to realise the extent of his obligation (a) One co trustee is sometimes bound to indemnify the other against loss (b)

6 Devastavit committed with concurrence or acquiescence of parties A creditor does not lose his right to sue the executors for devastavit and to recover from them the loss occasioned by mere laches But if the creditor misleads the executors so that they are thereby induced to part with the assets in a manner which would be a devastavit, then the creditor cannot complain (c) The court will not hold an executor liable for an act of devastavit committed with the sanction or by the desire of the parties injured by it, or for one committed without such sanction or desire if they have acquiesced in it (d) Although the general rule is that concurrence in the act or acquiescence without original concurrence will release an executor from liability, yet the Court must enquire into the circumstances which induced concurrence or acquiescence in order to determine whether the executor should be absolved from liability (e). By acquiescing for 30 years the plaintiffs were held to have lost their right to make any claim against the estate for breach of trust (f) Mere delay is no bar to legal relief unless the remedy is barred by limitation but delay with other circumstances and the conduct of the party claiming relief is sufficient to give rise to the inference of waiver or acquiescence or consent Where there are a number of executors the votes of the majority will govern (g)

7. Executors liability to pay interest. An executor keeping money, not wanted for administration in his hands without investing it, is guilty of negligence and liable to pay interest on the sum (h) so also an executor using assets of the estate for his own purposes is liable to pay interest (i) Where executors 'have applied the assets in direct dereliction of their duty' they have been held liable to pay interest (j) As a rule simple interest is decreed against executors (k) Where however, an executor uses the assets of the estate for his own purposes he shall be charged with profits actually obtained or compound interest at 5 per cent (l), but an executor is not liable to pay interest on sums paid bonafide to persons who are entitled to the same (m) nor on arrears of income unpaid by him even where there is delay in accounting (n)

(a) *Lakhmichand v Jayakuarbai* 29 B 170, 6 Bom L R 970

(b) *Bahin v Hughes*, 31 Ch D 390

(c) *Re Birch*, 27 Ch D 622

(d) *Griffiths v Porter* 25 Beav 236

(e) *Walker v Symonds*, 3 Swanst 1 cited in *Barrows v Walls*, 5 D G M & G 233 251, see *Re Baker*, 20 Ch D 230 but see *Sleeman v Wilson* 13 Eq 36 (whether allowing a claim to be barred amounts to acquiescence) W 1200, 12 Ed

(f) *Sleeman v Wilson*, 13 Eq 36.

(g) *Ardeshir v Manchershaw* 12 Bom L R. 53, 66.

(h) *Ashburnham v Thompson*, 13 Ves 402. *Johnson v Pendergast*, 28 Beav 480

(i) *Rocke v Hart* 11 Ves 58, *Vase v Foster* 8 Ch 309, 334, *Re Davis* (1902) 2 Ch 314

(j) *Pely v Stace* 4 Ves 620, *Mosley v Ward* 11 Ves 581, *Williams v Powell*, 15 Beav 461 W 1210

(k) *Robinson v Cumming* 2 Atk 410

(l) *Jones v Foxall*, 15 Beav 338, *Williams v Powell*, 15 Beav. 461, *Raphael v Boehm* 11 Ves. 92 13 Ves 407, 590. *Tebbs v Carpenter* 1 Madd 290, *Heighington v Grant* 5 M & Cr 258, but see *All Gent v Alford*, 4 D G. M. & G. 843 (rate of interest also discussed) W 1210 sq 12 Ed

(m) *Re Hulkes* 33 Ch D 552

(n) *Blogg v Johnson*, 2 Ch 225

assets (a), or to act as managing administrator (b), or they divide the work among themselves and each manages a part of the estate (c), or where he relies on the representation of his co-executor without any inquiry (d) An executor is not protected in such cases by an indemnity clause in the will absolving him from liability for acts of his co-executors (e) unless special indemnity has been granted to meet such a case (f)

The general rule is no doubt that trustees and executors are not chargeable with each other's defaults (g) Thus if one of several executors receives part of the testator's property, ordinarily he alone is answerable for it and his co-executors are not liable (h) Thus an executor is not liable who has no knowledge of the existence of a debt when his co-executor with such knowledge pays an inferior debt (i) But the benefit of this rule is denied to a trustee or executor who has been guilty of negligence (j) The law requires of trustees an active and vigilant prudence A trustee is called upon even if a breach of trust is threatened to prevent it by obtaining injunction (k) The standard of a trustee's or executor's duty has been held to be that of an ordinary prudent man of business in the conduct of his own and beyond that there is no liability or obligation on the trustee (l) This has been explained to mean the duty to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide (m) When one of several executors contracts a debt for goods apparently supplied to the estate, he is personally liable for it (n)

5 Employment of agent Trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as persons acting with reasonable care and prudence in conducting business of a like nature on their own account would conduct through agents (o) The same rule applies where a co-trustee is employed as a broker and paid as such under the terms of the will (p) A trustee, and therefore an executor also, will be liable even if he act honestly when he shows lack of diligence in the employment and super-

- (a) *Burrows v Walls* 5 D G M & G 233
- (b) *Lees v Sanderson* 4 Sim 82
- (c) *Lewis v Nobbs* 8 Ch D 591
- (d) *Shipbrook v Lord Hinchinbrook* 11 Ves 254 16 Ves 477, *Hewett v Foster* 6 Beav 259 *Broadhurst v Balguy* 1 Y & C C C 16, W 1195 1196
- (e) *Hanbury v Kirkland* 3 Sim 265, *Brumbridge v Brumbridge* 27 Beav 5
- (f) *Wilkins v Hogg* 3 Giff 116 W 1194 sq., 12 Ed
- (g) *Barnard v Bagshaw* 3 D J & S 355
- (h) *Dix v Barford* 19 Beav 409
- (i) *Hawkins v Day* Amb 162 W 1195 12 Ed
- (j) *Hanbury v Kirkland* 3 Sim 265

- Wilkins v Hogg* 8 Jur. N S 25 See S 26 Indian Trusts Act
- (k) *Re Cherisej Market*, 6 Price 279 cited in *Mahmood v Rodrigues* 7 Bom L R 691 (where the law is fully discussed)
- (l) *Speight v Gaunt*, 22 Ch D 727 reversed 9 A C 1
- (m) *Re Witley* 33 Ch D 347, 355
- (n) *Debendra v Hem* 31 C. 263 *Faithall v Faithall*, 7 Ch. 123, *Labouchere v Tupper*, 11 Moo P C. C. 193 relied on
- (o) *Speight v Gaunt*, 9 A C 1 (effect of a clause in a will empowering executors to employ agents considered). *Re Mackay* (1911) 1 Ch 300
- (p) *Shepherd v Harris* (1935) 2 Cl 310

vision of the agent because he fails to realise the extent of his obligation (a) One co trustee is sometimes bound to indemnify the other against loss (b)

6 Devastavit committed with concurrence or acquiescence of parties A creditor does not lose his right to sue the executors for devastavit and to recover from them the loss occasioned by mere laches. But if the creditor misleads the executors so that they are thereby induced to part with the assets in a manner which would be a devastavit then the creditor cannot complain (c). The court will not hold an executor liable for an act of devastavit committed with the sanction or by the desire of the parties injured by it or for one committed without such sanction or desire if they have acquiesced in it (d). Although the general rule is that concurrence in the act or acquiescence without original concurrence will release an executor from liability yet the Court must enquire into the circumstances which induced concurrence or acquiescence in order to determine whether the executor should be absolved from liability (e). By acquiescing for 30 years the plaintiffs were held to have lost their right to make any claim against the estate for breach of trust (f). Mere delay is no bar to legal relief unless the remedy is barred by limitation but delay with other circumstances and the conduct of the party claiming relief is sufficient to give rise to the inference of waiver or acquiescence or consent. Where there are a number of executors the votes of the majority will govern (g).

7 Executor's liability to pay interest An executor keeping money not wanted for administration in his hands without investing it is guilty of negligence and liable to pay interest on the sum (h) so also an executor using assets of the estate for his own purposes is liable to pay interest (i). Where executors have applied the assets in direct dereliction of their duty they have been held liable to pay interest (j). As a rule simple interest is decreed against executors (k). Where however an executor uses the assets of the estate for his own purposes he shall be charged with profits actually obtained or compound interest at 5 per cent (l) but an executor is not liable to pay interest on sums paid bona fide to persons who are entitled to the same (m) nor on arrears of income unpaid by him even where there is delay in accounting (n).

(a) *Lakhmichand v Jayakuarbai* 29 B 170 6 Bom L R 970

(b) *Bahin v Hughes* 31 Ch D 390

(c) *Re Birch* 27 Ch D 622.

(d) *Gilffiths v Porter* 25 Beav 236

(e) *Walker v Symonds* 3 Swanst 1 cited in *Burnips v Walls* 5 D G M & G 233 251 see *Re Baker* 20 Ch D 230 but see *Sleeman v Wilson* 13 Eq 36 (whether allowing a claim to be barred amounts to acquiescence) W 1200 12 Ed

(f) *Sleeman v Wilson* 13 Eq 36.

(g) *Ardeshtir v Manchershaw* 12 Bom L R. 53 66

(h) *Ashburnham v Thompson* 13 Ves 402 *Johnson v Pendergast* 28 Beav 480

(i) *Rocke v Hart* 11 Ves 58 *Vyse v Foster* 8 Ch 309 334 *Re Dacs* (1902) 2 Ch 314

(j) *Pely v Stace* 4 Ves 620 *Mosley v Ward* 11 Ves 581 *Williams v Powell* 15 Beav 461 W 1210

(k) *Robinson v Cumming* 2 Atk 410

(l) *Jones v Foxall* 15 Beav 338 *Williams v Powell* 15 Beav 461 *Raphael v Boehm* 11 Ves. 92 13 Ves 407 593 *Tebbs v Carpenter* 1 Madd 290 *Heighington v Grant* 5 M & Cr 258 but see *All Gent v Alford* 4 D G M & G 843 (rate of interest also discussed) W 1210 sq 12 Ed

(m) *Re Hulkes* 33 Ch D 552

(n) *Blagg v Johnson* 2 Ch

Liability of executor renouncing or not acting An executor renouncing after partially administering the estate and making over the assets to his co executor is liable for the assets received by him (a) for he cannot get his discharge before administration is completed or he must place it in the hands of Court (b) But an executor who has not proved the will is not liable as an executor (c)

9 Limitation An executor or administrator in whom no special trust is vested by the will for a specific purpose is not a trustee within the meaning of S 10 of the limitation Act (d) An action against an executor or administrator will be barred within 6 years from the termination of the administration (e) An executor cannot plead limitation when charged with devastavit by a creditor whose debt is acknowledged (f) Where the executor is barred the heir at law or beneficiary is equally barred (g) A successor in administration has the right to call his predecessor to account and respond in damages for devastavit mismanagement or breach of duty whereby any property of the deceased was diverted from a due course of administration (h)

369 (S 328 P. 147). When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount

Liability of executor or administrator for neglect to get any part of property

Illustrations

(i) The executor absolutely releases a debt due to the deceased from a solvent person or compounds with a debtor who is able to pay in full The executor is liable to make good the amount

(ii) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate The executor is liable to make good the amount

1 The section Such acts of negligence or careless administration as defeat the rights of creditors or legatees or parties entitled in distribution amount to a devastavit For if persons accept the trust of executors they must perform it they must use due diligence and not suffer the estate to be injured by their neglect (i) This may be illustrated by the following cases

- (a) *Underwood v Stevens* 1 Meriv 712
Rogers v Frank 1 Y & J 479 W 1199 12 Ed
 (b) *Craham v Kelle* 2 Dow P C 17
 (c) *Dice v Evers* 3 1 Rus & M 231
Stacey v Elph 1 M & K 195 W 1200
 (d) *Jenar Jan v Janida* 42 1 C 100
Ilwala v Gajenda 3 C 12 J 343 13 C W N 557

- (e) *Nagarathnammal v Mudali* 5 1 C 832 7 M. L. T 121
 (f) *Re Andersen* 26 Ch. D 783
 (g) *Kesha Prasad v Madho Prasad* 3 Pat 850 912
 (h) *Baroda v Gajenda* 9 C. L. J 383 424 13 C. W. N 557
Upendra v Bhupendra 32 1 C 267
 (i) W 1184 12 Ed ci 82
Talbot v Capener 1 Moll 299 299

2. Delay in effecting the sale. Executors are liable for delay in selling property and thereby occasioning loss to the estate (a), because it is the duty of trustees to use all diligence to obtain the best price for the property, but not where the executors have acted *bona fide* with diligence and in the honest exercise of their discretion (b). The principle has been thus enunciated (c) "Where an executor acts honestly it is not every act of imprudence, nor every act of bad management that is sufficient to charge him. There must in each case, be some gross act of what the law calls wilful default—some gross and striking inattention to his duty through which loss has been sustained by those for whom he is trustee". Where executors are given an absolute discretion to postpone the sale, they are not liable in the absence of *malafides* (d).

3 Delay in paying or realising debts. An executor is personally liable for delay in payment of a debt on which interest is running while he has assets in his hands (e), as also for allowing a debt due to the estate to be barred by limitation (f), or to become irrecoverable through bankruptcy of debtor (g) or his inability to pay (h), when but for such neglect the debt might have been recovered (i). But he is not liable for devasting if he has done all he can to obtain payment, but his efforts have not proved successful, or he has taken no steps and it appears that if he had done so, they would have been or there is reasonable ground for believing that they would have been ineffectual (j). He is liable for loss occasioned to the estate by neglecting to get in any part of the property of the deceased (k). An executor is personally liable for debts incurred in course of administration for purposes of the estate or for carrying on the testator's business. He is entitled to be indemnified if the borrowing was proper and for the benefit of the estate (l).

4 Losses arising out of investments. It is the duty of executors to invest money lying in their hands and not wanted for the purpose of administration in authorised securities (m). Then they are not liable for depreciation (n). But he will be liable for depreciation if funds be invested in unauthorised securities (o).

- (a) *Taylor v Tabrum* 6 Sim 281, *Hughes v Erson* 22 Beav 181, *Fry v Fry*, 27 Beav 144 *Grayburn v Clarkson*, 3 Ch 605 (there was direction to sell and no good reason for the delay)
- (b) *Buxton v Buxton* 1 My & Cr 80, *Marsden v Kent*, 5 Ch 598
- (c) *Selby v Bowie* 4 Giff 300, see *Marsden v Kent* 5 Ch D 598
- (d) *Re Norrington*, 13 Ch D 654, see *Re Crowther* (1895) 2 Ch 56, *Re Pitcairn* (1896) 2 Ch 199, *Re Chapman* (1896) 2 Ch 763
- (e) *Bale v Robins* 32 Beav 73
- (f) *Hayward v Kinsey* 12 Mod. 568, 573, see *East v East* 5 Hare 343
- (g) *Powell v Evans*, 5 Ves. 839, *Att Genl v Higham* 2 Y & C C. C 634, *Dhupatt v Andoor* 33

- 1 C 604
- (h) *Stiles v Gay* 16 Sim 230, *Re Brogden* 38 Ch D 546
- (i) *Stiles v Gay*, 16 Sim 230, *East v East*, 5 Hare 343
- (j) *Clack v Holland* 19 Beav 262, 271
- (k) *Khurshabhai v Hormajsha* 17 B 637, 644, *Jones v Higgins* 2 Eq 538
- (l) *Sudhir v Gobinda* 45 C 538 21 C W N 1043, *Jethabhai v Chotalal* 34 B 269
- (m) *Holland v Hughes* 16 Ves 111, *Tebbs v Carpenter* 1 Madd 290 See Ss 341 346
- (n) *Howe v Lord Dartmouth*, 7 Ves 150
- (o) *Howe v Lord Dartmouth*, 7 Ves. 137, *Clough v Bond*, 3 M. & Cr 490 W 1186 sq 12

Where trustees are bound to invest in Government funds (see S 348) if instead of doing so they retain the money in their own hands they may be held liable for the money or the amount of stock that might have been bought for the money. Where trustees have a discretion to invest in various ways but they retain the money in their hands, they are liable for the amount retained with interest (a)

Executors are also liable for allowing a part of the testator's estate to remain outstanding in an improper state of investment (b). He is liable for failure to realise monies invested in unauthorised securities (c), but not unless he can be charged with lack of diligence or having acted dishonestly or imprudently (d). An executor is not bound to call in investments in real securities where the risk is not apparent (e). He can also invest in real security where he has no reason to suspect that the security is bad (f). For the precautions which an executor may take see the authorities cited below (g). Where an executor is directed to continue to keep the funds in their existing state he is not liable for the loss (h). An executor incurs no liability by mere delay in proving the will (i). Trustees acting honestly with ordinary prudence and within the limits of their trust are not liable for errors of judgment (j).

5 Losses by agents. Executors are liable for devastavit if they allow another person to keep the funds of the estate or allow a person appointed by the testator to keep such money if the money cannot be recovered by them (k). Thus executors are liable for misappropriation of funds by solicitors (l), or by brokers (m). A solicitor engaged by a trustee is not debarred from accepting payments out of the estate if he has no notice of breach of trust on the part of the trustee (n).

Trustees are not bound personally to transact such business connected with the duties of their trust, as according to the usual mode of conducting business

- (a) *Robinson v Robinson* 1 D G M & G 255 W 1188 12 Ed
 (b) *Siles v Guy* 16 Sim 230 see *Dx v Buxford* 19 Beav 409 but see *Paddon v Richardson* 7 D G M & G 563 Re *Godwin* 67 L J Ch 645 W 1166 12 Ed
 (c) *Hughes v Empson* 22 Beav 181
 (d) *Buxton v Buxton* 1 My & Cr 80 *Marden v Kent* 5 Cl D 593, Re *Chapman* (1896) 2 Ch 763, but see Re *Grinley* (1893) 2 Ch 593, *Rausthorpe v Rowley* (1909) 1 Ch 409 n
 (e) *Hobbs v Lord Darlington* 7 Ves 137
 (f) *Brown v Liffon* 1 P W 140 but see *Nothbury v Nothbury* 4 Madd 191
 (g) W 1190 12 Ed *Stickn v Swell* 1 My & Cr 8 15 *Macleod v Annisley* 16 Beav 600 *Hillison v Gally* 7 Hare 516; *Ingle v Portledge* 34 Beav 411 *Learey v Wiffels* 12 Ac 727 (Trustee not put to proof in advancing money on

- agricultural freeholds to the extent of more than $\frac{1}{3}$ of the value or of more than $\frac{1}{2}$ of the value of freehold houses)
 (i) *Gray v Siggers* 15 Ch D 74 W 1187 12 Ed *Dhupall v Andoor* 33 I C 604
 (ii) *Re Stevens* (1897) 1 Ch 422 affmd (1898) 1 Ch 162
 (j) *Re Chapman* (1896) 2 Ch 763 773 (depreciation in an unauthorised security), *Marden v Kent* 5 Ch D 593 (investment in speculative security)
 (k) W 1166 12 Ed
 (l) *Gloss v Waller* 9 Beav 497, see *Sutton v Wilders* 12 Eq 373 *Re Brier*, 26 Ch D 238 but see *Speight v Gaunt* 9 A C 1 (executors not liable if agent was properly employed), *Clough v Bond* 3 My & Cr 490
 (m) *Mathews v Brier* 6 Beav 239 see *Rosland v Witterden* 3 Mac G 56 n
 (n) *Re Blundell* 40 Ch D 370 381

of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through agents, and if, under such circumstances, without any misconduct on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss (a) But where there is no necessity or no such practice a trustee cannot delegate trust money to the custody of strangers and will not be exonerated from liability if they leave such money in the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust they may have recourse (b) Trustees must seek advice on matters they do not understand but they are liable if they allow the trust money to pass into the hands of such advisers or others and in acting on such advice they must act with prudence (c) The rule applies where a co-trustee is employed as a broker under a direction in the will (d) A personal representative who is acting strictly within the line of his duty and exercising reasonable care and diligence will not be liable for failure or depreciation of a fund or for the insolvency or misconduct of a person who may have possessed it, yet if that line of conduct be not strictly pursued, he is liable. Necessity, which includes the regular course of business in the administration of the property, will exonerate the personal representative (e) But an obvious limitation of the rule stated in *Speight v Gaunt* (f) is that the agent must not be employed out of the ordinary course of his business (g) An executor is liable for loss where there is want of diligence on his part both in the selection and supervision of the agent (h)

6 Losses arising from failure of bankers, etc. 'With respect to losses sustained by the failure of bankers, or other persons in whose hands the money of the testator has been deposited by the executor, the rule seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind the executor will not be responsible for the loss' (i) So for money lost by an attorney in the country to whom it was transmitted in the course of business by the executor, the executor was not liable (j), nor for money which an auctioneer failed to pay (k) nor where investment in the bank which failed was made under the direction in the will (l) Where, however, there is no

- (a) *Ex p Belchier* Amb 218
 (b) *Rowland v Witherden* 3 Mac & G 568, 578. *Boslock v Floyer* 35 Beav 603, 1 Eq 26. *Speight v Gaunt*, 9 A. C. 1, fold in *Shepherd v Harris* (1905) 2 Ch 310
 (c) *Re Whitley* 33 Ch D 347, 350, 356, 12 A. C. 727, 731
 (d) *Shepherd v Harris*, (1905) 2 Ch 310
 (e) *Clough v Bond* 3 My & Cr 490, 496
 (f) 9 A. C. 1
 (g) *Fry v Tapson* 28 Ch D 268. *Re Mackay* (1911) 1 Ch 300, 306. *Inghen* 660

- (h) *Lakshmichand v Jat Kuarbat*, 29 B 170
 (i) W citing *Churchill v Jackson* 1 P W 241; *Knight v Ford* *Plymouth* 3 Atk 490; *Lensick v Clark* 31 L. J Ch 728; *Re Bird* 16 Eq 203; *Speight v Gaunt*, 9 A. C. 1 *Re Bird* 26 Ch D 238; *Wills v Groom* 25 L J Ch 724 and other cases
 (j) *Bacon v Bacon*, 5 Ves 311 335; *Re The Clifford's Estate* (1900) 2 Ch 707
 (k) *Edmonds v Pratt*, 7 Beav 21
 (l) *Blupell v Anker*, 33 L J Ch 604

necessity for entrusting money to a banker or other person (a) or where an executor or trustee makes no enquiry whether funds in the hands of bankers have been invested or not and the bankers became insolvent (b) or where an executor puts the money in his own account in a bank and the bank fails (c) the executor is personally liable

7 Losses on personal securities An executor is not liable for loans upon personal securities if he exercise a fair and reasonable discretion on the subject (d) In *re Grindey* (e) a testator directed his executors and trustees to continue to maintain his estate in the same state of investment as it stood at his death. A part of the assets consisted of a debt due to the estate upon a promissory note. The executors never called in nor applied to the Court for directions as to the debt. The debtor died an insolvent and there was a loss to the estate held the executors having acted honestly and reasonably were not personally liable under section 33 of the Judicial Trustees Act 1896 (f) But executors even when empowered to lend money on personal security, must exercise proper diligence and vigilance in investigating into the solvency of the borrowers. They have been held liable also for losses accruing to the estates on loans given to co executors (g)

8 Failure to realise assets Courts ought generally to be averse from charging executors who intended fairly to discharge their duty and cautious not to hold them liable upon slight grounds thereby deterring others from taking upon them such an office. Executors ought not without good reasons permit money to remain upon personal security longer than is absolutely necessary and they have been held liable for failing to call in money lent by the testator on a bond (h) The executors ought to get in the money within a year (S 337) but this is not an inflexible rule as they have a reasonable discretion in special cases (i) A direction to convert with all convenient speed is no more than the ordinary duty implied in the office of an executor and there must necessarily be some discretion (j) Executors have been held liable for allowing beneficiaries to enjoy in specie wasting property without realising it (k) and for arrears of rent (l) Where a settlor failed to keep on foot a policy of insurance on his life and the trustees through ignorance overlooked to collect the value of

- (a) *Drake v Marlyn* 1 Beav 525
Rehden v Wesley 29 Beav 213
 (b) *Challen v Shippam* 4 Hare 555
 (c) *Wren v Ardon* 11 Ves 377
Marsey v Banner 4 Madd 413
 (d) *Wheeler v Woodger* 5 B & Ald 360 364
 (e) (1898) 2 Ch. 593
 (f) 59 & 60 Vict. c 35 *Re Godwin* 87 L. J. Ch 645
 (g) — *Walker* 5 Russ 7 *Stickney v Sewell* 1 My & Cr 6 W 1193 12 Ed
 (h) *Powell v Evans* 5 Ves 832
Roxley v Adams 4 My & Cr 334 *Engle v Kingston* 8 Ves

- 466 but see *Re Grindey* (1898) 2 Ch 593 as to the effect of the Judicial Trustee Act.
 (i) *Grayburn v Clarkson* 3 Ch 615
 But this is not an inflexible rule *Re Chapman* (1896) 2 Ch. 763 782
Brown v Gellally 2 Ch 751 See S 337 note.
 (j) *Burton v Burton* 1 My & Cr 80 93
 (k) *Wrightwick v Lord* 6 H L C 217
 (l) *Tells v Carpenter* 1 Madd 290
Burton v Burton 1 My & Cr 80 95

the settled policy, they were to be liable for the same as the testator. In England executors have the right to sue for the same as the testator, and upon them by the executor's right to sue.

9 Liability after administration decree. When an administration decree has been made the executor's management is not in the hands of the court, but the executor must be personally liable for the propriety of the decree proposed to be adopted by the trustee. When an administration decree is made the executor must be personally liable for the court, otherwise he will be personally liable.

10 Liability for accident. An executor or administrator is not liable for the position of a gratuitous bailee and like a bailee is not liable for the same, even if an accident where all reasonable care has been taken (a). Thus he has been held not liable on a house being burnt down for failing to keep up the fire insurance, but he will be liable where there has been negligence on his part (b).

11. Liability for devastavit, etc. The liability in case of a breach of trust is not in damages but for restitution in the nature of a debt (k). A person injured by devastavit is a simple contract creditor of the executor or administrator and his claim against the personal representative is barred at the expiration of 6 years under English law (i). But an executor in rendering accounts in an administration proceeding cannot "first set up his own devastavit, and upon such devastavit raise the defence of the Statute of Limitation" (j). It has been noted already (see notes on previous section) that a party suing is not entitled to any relief against the personal representative where he concurs or acquiesces in the devastavit (k).

- (a) *Re Godwin* 87 L. J. Ch. 645.
 (b) See the Trustee Act 1893 (56 & 57 Vict. c. 58), The Judicial Trustee Act 1896 (59 & 60 Vict. c. 30 S. 30).
 (c) *Bethell v Abraham* 17 Eq. 24.
 (d) *Widdowson v Duck* 2 Mer. 494 498 9, W. 569, 12 Ed.
 (e) *Brown v Sewell* 11 Hare 52.
 (f) *Fry v Fry*, 27 Beav. 144 146, *Bailey v Gould*, 4 Y. & C. Ex. 221.
 (g) *Hornby v Matcham* 6 Sim. 325, - *Job v Job* 16 Ch. D. 562, see

- Re Symons* 21 Ch. D. 757.
 (h) *Ex p. Adamson*, 8 Ch. D. 807 819, *Re Macfadyen* (1908) 2 K. B. 817.
 (i) *Re Gale* 22 Ch. D. 820, *Charlton v Low* 3 P. W. 328, see *Lacons v Wormoll* (1907) 2 K. B. 350.
 (j) *Re Marsden* 26 Ch. D. 783, *Re Re Hyatt*, 38 Ch. D. 609.
 (k) *Walker v Symonds* 3 Swann. 1 64, *Chillingworth v Chambers*, 1 Ch. 685 693, *Fletcher v* (1905) 2 Ch. 24.

PART X.

Succession Certificates.

370. [S. C. 1 (4)] (1) A succession certificate (herein-

Restriction on grant of certificates under this Part. after in this Part referred to as a certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate :

(N. C. A. 5) Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

[S. C. 3 (2)] (2) For the purposes of this Part, "security" means—

(a) any promissory note, debenture, stock or other security of the Government of India or of a Local Government ;

(b) any bond, debenture, or annuity charged by Act of Parliament on the revenues of India ;

(c) any stock or debenture of, or share in, a company or other incorporated institution ;

(d) any debenture or other security for money issued by, or on behalf of, a local authority ;

(e) any other security which the Governor General in Council may, by notification in the Gazette of India, declare to be a security for the purposes of this Part.

1 Certificate procedure. The certificate procedure was introduced in 1811 (Act XX) for the purpose of protecting debtors from being harassed by claimants after the death of the creditor and to facilitate the collection of debts on succession by the issue of a certificate. Various amendments were introduced from time to time until the Act (XXVII) of 1860 came into force. That was amended in its turn by Act VII of 1889 which is now incorporated in the present Act and consequently repealed. Various regulations were passed both before and after the passing of the Act dealing with the subject (for a list see Kinney 590—1). Of these, Regulation III of 1827 is still in force in Bombay. Both the Acts of 1860 and 1889 recite that it is expedient 'to facilitate the collection of debts on successions and afford protection to parties paying

debts to the representatives of deceased persons". A succession certificate could not be granted by a Judge sitting on the original side of the High Court (a) But in view of the amendment of S 2 by the Amending Act XVIII of 1922 it has now acquired the power to issue succession certificates. The reason is that the Act of 1925 contained no definition of the term 'District Judge' and accordingly the definition in the General Clauses Act applied. Under the proviso to that definition a Judge of the High Court is excluded from the definition, the result was that the Act of 1925 did not give a judge of the High Court jurisdiction to grant probate or letters of administration. In order to meet this difficulty the Amending Act of 1922 was passed. That Act defined the words 'District Judge' as they had been defined in the General Clauses Act but omitted the proviso (b)

2. Object of the Suc. Cert Act. The object of the Act was not to enable parties to litigate questions of disputed title but (1) to enable debtors to pay the debts due by them with safety to the representatives of deceased Hindus &c, and (2) to facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same. In other words, the objects of the Act were to enable debtors to get sufficient acquittances when they pay money due to the estate of a deceased, and to preserve that estate from loss by giving some one the right to collect the debts, lest they should become irrecoverable, *e g*, by operation of the law of limitation or otherwise. In effect, the holder of the certificate is a trustee, liable to account for the monies received by him to the legal heir or representative of the deceased (c). The Act was passed for the protection of honest debtors (d), its object being to obtain the appointment of someone to give a legal discharge to debtors to the estate for the debts due (e). The expression, 'protection of debtors', means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act or is compelled by a decree of a Court to pay it to that person, he is lawfully discharged (f). Where the object of the proceedings is not to recover a debt but to obtain a share of the family property from the members, the proceedings do not come within the purview of the Act (g), nor are certificate proceedings intended to determine the share of the applicant in the debt or to adjudicate upon the relative rights of the applicant and others therein (h) or to determine whether the debts have been discharged (i). All that the court has to do is to ascertain the right of the applicant to the certificate (j).

(a) *Re Shamlal Das*, 5 B L R 21 appdx

(b) *Re Aroonachellam*, 9 Rang 205, *Re Bholanath* 58 C 801, 35 C W N 122, *Re Kuppuswami* 53 M 237 59 M L J 17, 126 I C 481 fold

(c) *Prankisto v Nobodip* 8 C 868, *Gunindra v Jugmala*, 30 C 581 See S 214 n 2

(d) *Raja of Kalahasti v Achigadu* 17 M L J 367, 371, *Rani Raissunnissa v Rani Khujannissa*, 4 B L R A C 149 153 See

S 373(4) *Goswami Sit Raman v Haridas*, 38 A 474

(e) *Gunindra v Jugmala* 30 C 581, *Khan Deol v Salmat Rai*, 126 I C 440

(f) *Baikashi v Parbhu* 28 B 119

(g) *Shaik Moosa v Shaik Essa*, 8 B 241 255

(h) *Ghafur v Kalandari*, 33 A 327, 9 I C 127

(i) *Sakat v Kalori*, 71 I. C. 376

(j) *Kashi v Parbhu*, 5 Bom L R 721

3 A succession certificate Ordinarily a certificate should not be granted to rival claimants jointly (a) but it has been observed in a Madras case that it is not illegal to grant a joint certificate to persons who claim adversely to each other particularly where the real object of the parties is to obtain a decision on some ulterior question of title (b) This view has not been accepted by the other High Courts Thus the Bombay High Court has held that a joint certificate cannot be granted under the Act (c) In certificate proceedings the Judge has no jurisdiction to construe a will in order to decide who are the persons beneficially interested in the estate and in what proportions or shares All he has the jurisdiction to decide is who are the proper persons to be granted the certificate The Court has no jurisdiction to direct that a fraction of a property when received should be paid to a particular individual The Court should view with disfavour the grant of separate certificates to separate individuals in respect of different properties of the deceased (d) Similarly, it has been held by the High Courts of Allahabad and Calcutta that it is the duty of the Court where there are several claimants, to determine, which of the several applicants appears to it to be the person having *prima facie* the best title (e)

4 Sub sec (1) Debt or security to which a right is required *etc* The meaning of these words will appear clear from the following observations in the Notes on Clauses The effect of the section here reproduced is apparently that succession certificate cannot be granted in a case where the law requires probate or letters of administration to establish a representative title before the Court In cases where letters of administration or probate are not essential *i.e* cases falling within the Act of 1881 a certificate can apparently be granted The clause is based on this view of the law

This sub section bars an application for a succession certificate in respect of a debt to which a right can be established by letters of administration or by probate under the Indian Succession Act (f) So those classes who are governed by the Indian Succession Act are not entitled to apply for a grant of a certificate (g) The position with regard to Hindus &c is that except in cases falling under the Hindu Wills Act (now very much enlarged in its scope by the amendment of S 57), an executor of any Hindu will may establish his right in a Court without taking out probate (h) and Hindus *etc* are not bound to take out letters of administration (S 212) The same

- (a) *Shitab Del v Debt Prasad* 16 A 21 *Ramraj v Biljnath* 35 A 470
 (b) *Narajanamsami v Kuppasami* 19 M 477 See *Ramraj v Biljnath* 35 A 470
 (c) *Madan v Ramdial* 5 A 19; *Jamnahal v Hastubai* 11 B 179 184 *Lonachand v Ullamchand* 15 B 14 See observations in *Rani Rajunissa v Rani Khujunnissa* 4 B L R 147 150 at certificate should not be granted where parties are not alone accord *Ram Raj v Biljnath* 35 A 470
Abul Ghafar v Jaja Ali 31 Bom

- L R 1093
 (e) *Shitab Del v Debt Prasad* 16 A 21 *Basanta v Pabali* 31 C 133
 (f) *Jamna Kuar v Daulat Rai* 2 A L J 126
 (g) *Kalidas v Bai Mahali* 16 B 712 *Dave Lilladhar v Bai Parvati* 18 B 603 *Achutan v Cherottil* 22 M 9 *Jamna Kuar v Daulat Rai* 2 A L J 126; See *Ramesh v Kamini* 39 I C 525 *Rattan Singh v Raj Singh* 69 I C 332
 (h) *Shah Moosa v Shah Gissa* 8 B 241 See *Bhagwanram v Becharjee* 6 B 73 S 213

Insurance money upon a policy of has been held to be a part of the estate of the deceased (a), but where the amount of the policy is an unliquidated or undetermined sum depending on the prompt payment of premiums and the duration of the life of the insured, it cannot be regarded as a debt though it is part of the estate of the deceased (b). The Court is not competent to grant a certificate in respect of the estate of a deceased person which goes to persons who are not necessarily heirs of the deceased c g, in respect of a gratuity payable to a nominee of a person (c)

7 Security Amount in fixed deposit in a Bank has been held not to be a security (d)

8 Effects. Assignment of debt A person claiming as assignee of a debt which was due to the estate of a deceased person is not claiming "the effects of the deceased" From the date of the assignment, the debt due to the deceased ceases to be part of the effects of the deceased whereas a claim contemplated by this section is a claim made by a person in the capacity of a personal representative of a deceased person An assignee of a debt, therefore, to whom a succession certificate was granted subsequent to the assignment is entitled to a decree for the debt without obtaining a succession certificate in his own name (e) Where the assignor had obtained a certificate in respect of the entire debt assigned, a fresh certificate is not required to be taken out by the assignee (f).

9. Time and opportunity for production of certificates See S 214 n 5 and n 6

10. Execution proceedings. An application for execution without a certificate is perfectly in order, only, no relief can be granted until the succession certificate is produced The application for execution cannot be summarily rejected (g)

371. (S. C 5). The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

Jurisdiction. This section defines the jurisdiction of the Court for the purpose of a grant of a certificate The ordinary circumstance which gives rise to jurisdiction is that of residence within the local limits of the jurisdiction of the Court

- (a) *Brojendra v Niladrinath* 50 C. L. J 239, 33 C. W. N 1177 F. B.
 (b) *Charaita v Jyollish*, 33 I C 157
 (c) *Hanifabai v Karachi Port Trust*, 117 I C 151
 (d) *Gulraj v Jugdeo* 28 A 477
 (e) *Arunachalam v Mathu* 42 M 130
Gowami Sit Raman v Haridas

- 38 A 474
 35 A 79
Har Das,
 S 214 n.
 (f) *Rang Lal*
 J 965, n.
 42 M 13
 (g) *Alsha Bai*
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the alternative provision applies only in cases as is distinctly stated in the section where the deceased at the time of his death had no fixed place of residence within the jurisdiction of the Court (a) Residence denotes the place where a person or his family eats drinks and sleeps Residence is not convertible and identical with ownership (b) The Succession Act (XXVII of 1860) did not provide for the administration of the effects of a foreigner domiciled abroad whereas Regulation VIII of 1827 still in force in Bombay Presidency looks simply to the locality of the assets as the ground of the Court's jurisdiction (c) Where a person had no fixed place of residence at the time of his death the Judge of the district in which his debts are has authority to grant a certificate Property therefore includes debts (d) Where a certificate has once been granted it is not open to the Court before which the certificate is produced to question the right of the Court which granted it (e)

District Judge The definition of the term was excluded from the Act of 1925 but has since been included by the Amending Act XVIII of 1925 The effect of the Amending Act has been to change the law in a material particular *eg* it has enabled the High Courts to grant succession certificates (f)

The Sonthal Pargannas constitute a district and the Deputy Commissioner of the district is vested with the powers of a District Judge (g) In Chota Nagpur it is the Court of the Judicial Commissioner and not of the Deputy Commissioner that is the District Court (h)

372 (S C 6) (1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely —

(1) the time of the death of the deceased,

(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits,

(c) the family or other near relatives of the deceased and their respective residences,

- (a) *Chan Poo v Chan Chor* 75 I C. 225
Mir Ibrahim v Ziauddin 12 B. 153
Ram Saran v Gopu 33 I C. 603
Ci S 270
 (b) *Kamud v Jalindra* 13 C. L. J. 221
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 (c) *Mir Ibrahim v Ziauddin* 12 B.

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 (d) *Re Golam Mohamed* 20 W. R. 286.
 (e) *Durga Das v Gulla* 27 A. 87
 (f) See S 370 note (1)
 (g) *Kalasad v Meher* 4 C. 222.
 (h) *Joyram v Meher* 16 C. 13

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(d) *Gulraj v Jugdeo* 25 A. 477.

(e) *Arunachalam v Mathu*, 42 M. 130, *Gowami Sit Ramani v Hari Das*

39 A. 474, *Allah Dad v Sant*, 35 A. 79 *dingl.* see *Raman v Hari Das*, 14 A. L. J 677. See S. 214 n. 6

(f) *Rung Lal v Annu Lal*, 11 A. L. J 965, see *Arunachalam v Mathu* 42 M. 130

(g) *Aliba Bai v Akabuli*, 6 Pat 410

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(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of ^{the} jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits , ✓

(c) the family or other near relatives of the deceased and their respective residences ,

- (a) *Chan Pgu v Chan Chor*, 75 I C 225, *Mir Ibrahim v Ziaulnissa* 12 B 153, *Ram Saran v Gappu* 33 I C 603 Cf S 270
(b) *Kumud v Jaitindra* 13 C L J 221, *Ram Saran v Gappu*, 33 I C 603
(c) *Mir Ibrahim v Ziaulnissa* 12 B

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(d) *Re Golam Mahomed* 20 W R 286
(e) *Durga Das v Gulla*, 27 A 87
(f) See S 370 note (1)
(g) *Kaliprasad v Meher*, 4 C 222
(h) *Joynarain v Mldhoo*, 16 C.

(d) the right in which the petitioner claims ;

(e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted ; and

(f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof.

The section. The section sets out the contents of an application for a certificate and the mode of its verification. It also sets out the penalty for a false averment. See Ss. 276 and 278

Verified : The mode of verifying a pleading is laid down in O. 6 r 15. It requires that every pleading shall be verified at the foot by the party or by some other person acquainted with the facts of the case. The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies upon his own knowledge and what he verifies upon information received and believed to be true. The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. The omission to verify a pleading in the manner required by the rule is a mere irregularity within the meaning of S. 99 C. P. C. (a).

Cl. (b). This clause though somewhat differently worded has exactly the same meaning as the provision in S. 371 and has not the effect of extending or restricting the jurisdiction given by the section (b)

Cl. (d). A person to whom a certificate is to be granted must be one who has some title or interest in the debt to collect which a certificate is applied for. It has been the practice to issue a certificate to the person who has *prima facie* the clearest title to the succession, such as the natural heir, and to leave a person whose claim to a superior title is on reasonable grounds disputed to establish that title by a regular suit (c). When a title depends upon a question of fact, that question must be gone into before it can be held who has a preferential claim to be the representative of the deceased, and entitled as such to a certificate to collect the debts of the deceased (d). Where of two applicants one was an heir

(a) *Shi Deo v. Ram Prasad* 46 A 677, 643; *Ram Gopal v. Dhirendra* 54 C 357
(b) *Chen Pyu v. Chen Chai* 75 I C 225

(c) *Surfol v. Kamabhlamba* 7 M 452
(d) *Ashgar v. Ashraf*, 15 C. 574 585
(see cases referred to) See S 373 (3)

and the other not the former was held entitled to a grant (a). The section is not confined to heirs but extends to assigns of heirs of deceased persons who can realise their respective debts on obtaining succession certificates where the heirs have not obtained them and time will be allowed to the assigns for the purpose (b). Where the parties are governed by Mitakshara law, in a suit by the son for the recovery of money which was the self-acquired property of the deceased father, a certificate must be produced before he can obtain a decree (c). A curator is not required to take out a certificate as he is not entitled to the effects of a deceased person (d). The Court is competent to grant a certificate in respect of the estate of a deceased person, when the property goes to the heirs, but not in respect of property which goes to others, *eg* nominees (e). The right of the reversionary heirs to take out succession certificate in respect of debts due to the estate of the deceased is not affected by the interposition of the estate of the widow (f).

Minor. It has been held by the High Court of Allahabad that a certificate may issue to a minor represented by his next friend, because there is no express prohibition in the Acts XXVII of 1869 and VII of 1839 (or in this Act) as in the case of a grant of probate (S 223) or of letters of administration (S 236) (g). This view has been doubted in Bombay, where it has been held that a certificate cannot be granted to a guardian not appointed under the Act (h), but it is competent to the Court to grant a certificate to a guardian appointed under the Act (i). But it has been pointed out by the High Court of Madras that the execution of a bond by the guardian on behalf of a minor applicant would bind the minor and the Bombay decisions ignore the difficulties that would arise in the collection of debts of a minor heir of a deceased person (j). A certificate of heirship cannot be granted to a minor under Bombay Regulation VIII of 1827 (k).

Cl. (e). S 370 says that a certificate cannot be granted where a right to a debt or security is required to be established by probate or letters of administration (l). S 212 does not apply in case of intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jain or Indian Christian and probate is necessary in case of wills of Hindus, Buddhists, Sikhs and Jains who are governed by S 57. An application for succession is not to be refused simply because a certain dispute between the parties can be easily settled in probate or administration proceedings (m), or because subsequently an application for letters of administration has been made

(a) *Krishna v. S. S. for Inda*, 35 C 631, 12 C. W. N 453

(b) *Grishan v. Zakir*, 42 A. 549, 57 I. C. 55 (see cases cited), *Ramcharan v. Ram Narain*, 40 I. C. 96

(c) *Pairoan v. Srinikasa*, 44 M 499, 62 I. C. 944 F. B

(d) *Bakasab v. Nanappa*, 20 B. 437.

(e) *Hanifabek v. Karachi Port Trust*, 117 I. C. 151.

(f) *Ahinas v. Prabodh*, 15 C. W. N 1013.

(g) *Ram Kuar v. Sardar Singh*, 23 A 352; *Re Sunderdas & Jannadas*, 101 I. C. 116 (Sind) (see cases and

principles discussed), *Mst Oomrao v. Syad Aga*, 12 W. R 119

(h) *Gulabchand v. Chafraji*, 25 B 523, 3 Bom. L. R. 795

(i) *Ex p. Mahadeb*, 28 B 344; 6 Bom. L. R. 281; *Re Dhanbal*, 10 I. C. 931.

(j) *Krishnama v. Venkammah*, 36 M 214, 15 I. C. 425; *Re Sunderdas & Jannadas*, 101 I. C. 156 (see cases reviewed)

(k) *Bal Baka v. Bal Doga*, 6 B. 725

(l) See S 370 note v. Ann

(m) *Ramcharan v.*

by the next friend of an infant. The petition should state that there is no impediment to a grant of the certificate and the Court should be satisfied with regard to the averments in the petition (a)

Cl (f) A court has no power to grant a certificate except upon a petition complying with the provisions of the Act. Amongst other things the petition must specify each debt and security in respect of which the certificate is asked (b) and under S 374 the certificate when granted must likewise specify each debt and security covered by it. The clause requires only those debts and securities to be mentioned in respect of which the certificate is applied for so it is not necessary as a general rule that a list of debts should be filed before a certificate can be granted (c). The applicant is at liberty to have the certificate extended to debts not originally mentioned (d). A certificate can be issued only in respect of debts and securities which are mentioned in the application as forming part of the estate of the deceased (e). A certificate could not be granted to a person entitled to a part of a debt as a debt did not mean a portion of a debt but the law has now been changed (see sub sec 3) (f). A misdescription of a debt may be amended but not where the effect would be to substitute one kind of debt for another (g).

Limitation. There is no time limit prescribed by the Limitation Act for an application for a certificate (h). Art 186 of that Act does not apply to applications for certificates to collect debts (i). The Court cannot reject an application for a certificate by the heirs merely on the ground of the deceased having died long ago (j) unless the presumption arises of the debts becoming barred and therefore of no debts being due to the deceased which could be recovered (l). Lapse of 7 years has been held not sufficient for rejecting an application for a certificate (l).

Second application. A second application will lie where a previous grant was subject to a condition e.g. as to security which the applicant was unable to comply with (m).

Sub-section 3. It was settled by judicial decisions that Courts were not empowered to grant certificates to different persons in respect of portions of debts

- (a) *Dace Liladhar v Bai Parcall* 18 B 698
 (b) *Maung Tha v Maung Hlow* 8 I C 996
 (c) *Radhika v Judoo* 20 W R 412
In Mirza v Taleb 18 W R 330 no list of debts was filed apparently because no debts had to be collected
 (d) *Surdammal v Kullappa* 5 M L J 36
 (e) *Re Teresa* 22 W R 45
Dharmo v Mungul 24 W R 203
 (f) *Chafur v Kalandhar* 33 A 327
91 C 27 F B See Abdul Gafur v Jafar 31 Bom L R 1693
and see 5 370
 (g) *Sundar Singh v Patam Singh* 110

- 1 C 479
 (h) *Pulashmonce v Anundmoyee* 8 W R 393
 (i) *Janki v Kesavalu* 8 M 207,
Re Ishan 6 C 707 *Bai Manekbai v Manekji* 7 B 213 *fold Bai Kashi v Gopi* 19 C 43
Gnomully v Vana Kollipati 17 M 379
 (j) *Abinash v Probodh* 15 C. W N 1018
 (k) *Koos Behary v Gacool* 3 C. 616
(appla made 40 years after death)
see Hoorna v Kallee 7a a 25 W R 93 C. R
 (l) *Durgadas v Jadunath* 2 B L R 26
 (m) *Purna Kori v Chunni Lal* 14 A L J 54 35 I C 718

or fractions of properties (a), the Calcutta High Court however took a different view (b). This sub-section in allowing an application for a certificate to be made in respect of a portion of a debt due to a deceased creditor has adopted the view of the Calcutta High Court and set at rest the conflict of judicial decisions (c). The sub-section was added by Act. XIV of 1928 S 2.

373. (S. C. 7). (1) If the District Judge is satisfied ^{Procedure on} that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

(a) *Abdul Ghafur v. Jayarabi*, 31 Bom. L. R. 1093, (nor probate nor letters of administration); *Sunder Singh v. Karam Singh*, 110 I. C. 479; *Sughra v. Mohammad*, 43 A. 341, 81 I. C. 6; *Kishore v. Nihal*, 70 P. R. 1904.

(b) *Annapurna v. Nalini*, 42 C. 10, 23 I. C. 556.

(c) *Brojendra v. Niladri Nath*, 33 C. N. 1177, 120 I. C. 2. Object and Reasons of Bill of 1927, Gazette of Part V. p. 24.

The section The section lays down the procedure to be followed by the court on the presentation of an application for a succession certificate. Sub sec (1) of (a) empowers the Court at its discretion, to require notice of the application and of the day fixed for hearing to be served on any person it thinks fit. *Registration does not necessarily give notice to anybody of any thing (a)* But See S 3 Transfer of Property Act

Cl (1). Decide in a summary manner It is settled that there must be an enquiry into the title of the applicant before a certificate is granted. The Legislature contemplates first that the District Judge shall be satisfied not that a succession certificate will be necessary or exigible under S 214 or otherwise but that it is a serious and sensible application by a person who desires to make a claim in the representative character which he seeks. The Court upon an application for a certificate has not to decide for itself, as a condition of granting the certificate, that the case is one in which the debt was due to the deceased person within the meaning of S 214. *A reasonable and sensible claim is sufficient to enable a party to proceed against a third person as being a debtor of a deceased person.* The issue of a certificate may be justified without the Court arriving at a conclusion that such a certificate is a necessary condition without which the claim could not succeed. It is not necessary to find that there is good *prima facie* evidence that the debts were due to the deceased (b). But the Court has to decide whether the applicant is entitled to the certificate (c). Thus the court has to try the question between two parties one of whom, according to certain given facts would be the heir and the other a total stranger, as to who is entitled to the certificate. The case is different when there is a contest between a natural heir and a person who sets up a special title (d). Where however without enquiry, it is admitted that there are no debts due to the deceased no certificate should be granted (e).

The words In a summary manner indicate that the Legislature requires the Court to decide in a summary manner the right to the certificate. It contemplates a short enquiry, leading upto and resulting in a rapid decision in contrast with the lengthy investigations which may be required for the more tardy determination of a regular suit (f). A court therefore is not warranted in passing an order granting a certificate without making an enquiry at all, but must decide all questions relevant to the issue in however summary a manner (g).

(a) *Gardhandas v Mohanlal* 45 B 170, 22 Bom L R 1158

(b) *Brojendra v Lalitnath* 57 C 814 33 C W N 1177 F B overruling *Radharani v Binduban* 25 C 320 2 C W N 59 In *Indira v Ramasami* 25 M L J 365 *Chinna v Kol Kauthatal* 17 M L J 257, *Bal Kashi v Jaijua* 25 B 119 5 Bom L R 721 it has been held that the Court need not try the question whether the debts belonged to the deceased.

(c) *Jaijua v Bal Kashi* 16 B 712

Bal Kashi v Parbhu 28 B 119

Isuri v Balabhadra 23 C 431

Beemul v Shikhar 24 W R 211

(f) *Asgar v Abdul* 15 C 575

(e) *Bisnoo v Mungul* 24 W R 203 see *Fuzl Moula v Gholam* 12 W R 505

(f) *Gulabchand v Moli Chattraji* 25 B 523 3 Bom L R 793 1013

in *Chuni Lal v Gulab Chand* 8

1 C 733 *Ram Suran v Gappa*

33 1 C 603 *Ram Prithna v*

Agasmal 21 M L J 814

(g) *Balm Kunt v Kunlan* 27 A 452

An enquiry is necessary where many of the facts, but not all, are admitted by both sides (a) Where a judge on legal evidence before him has come to a conclusion, the proceedings cannot be set aside on the ground that they have been of a protracted nature (b)

Cl. (2). As soon as the Court has determined the right to the certificate, it must be issued directly provided the proper stamp prescribed for such certificate be furnished (c)

Cl. (3) The language of this clause is probably borrowed from *Surfo v Kamakshamba* (d) The District Judge should "decide in a summary manner the right to the certificate" when the issues are capable of being decided without difficulty in a summary proceeding, but when they are too difficult to be decided in this fashion, then the *prima facie* title to the certificate will prevail (e) The court is bound to enter into some enquiry, but not as if it was trying a suit. It must base its decision upon *prima facie* evidence with which it is sufficiently satisfied (f) A certificate cannot be withheld or, if granted, cannot be cancelled on the ground that the property is of considerable value and a regular suit is bound to follow regarding the estate of the deceased (g) A certificate should not be refused simply on the ground that a regular suit involving the question of succession between the parties is pending (h), or on the ground that the applicant might have applied for probate where the taking of probate is not compulsory (i).

Nature of enquiry The Judge shall endeavour to determine whether the applicant is the proper person to be clothed with a legal title and it is clear that any intricate questions of fact or law bearing upon this question may be determined in a summary manner (j). Though the right to the certificate is not the same thing as the right to the estate of the deceased proprietor, yet it is not altogether unconnected with that right, for the right to the certificate cannot belong to a stranger who has no connection with the estate (j) The Act is not intended to afford to litigant parties an opportunity of litigating contested questions of title to property (l) or of the exact character of an applicant's claim (m)

(a) *Saraswathi v Subbar*, 21 I C 867, *Kalidas v Bai Mahali*, 16 B 712

(b) *Mst Jigri v Syed Ali*, 5 C W N 494, *Angappa v Meenakshi*, 24 M L J 193, *Huni v Balabhadra*, 23 C. 431, *Dharmaya v Soyana*, 21 B 53, *Balmukund v Kundan*, 27 A. 452, 2 A L J 144, *Ram Saran v Goppu*, 33 I C 603

(c) *Dhanpal v Government*, 17 W. R. 489

(d) 7 M 453; see *Huni v Balabhadra* 23 C. 431

(e) *Sicamma v Suthamma*, 17 M 477, *Idid in Dharmaya v Soyana*, 21 B 53; *Ghasur Khan v. Kalandari* 33 A 327; *Jigri Begum v. Syed Ali* 5 C. W. N. 494; *Chunni v. Gulab*, 8 I C. 733; *Rathan Sirek*

v. Raj Singl, 68 I C. 302, *Champa Lal v. Laherbat*, 57 I C. 641, see *Angappa v Meenakshi*, 24 M L J 193, 18 I C 733

(f) *Balmukund v Kundan*, 27 A 452, *Ghasur v Kalandari*, 33 A 237, see *Ram.aran v Goppu*, 33 I C. 603

(g) *Kahn Devi v Salamat Rai*, 126 I. C. 410

(h) *Bassa v Amir*, 24 I C. 873

(i) *Kalidas v Bai Mahali*, 16 B 712

(j) *Brotendra v Aladinaath*, 57 C. 814, 33 C. W. N. 1177 F B

(k) *Huni v Balabhadra*, 23 C. 431

(l) *Huni v Balabhadra* 23 C. 431, *Soyana v Suthamma*, 17 M. 774

(m) *Brotendra v Aladinaath*, 57 C. 814, 33 C. W. N. 1177 F B

res judicata between the parties (a) or of barring a trial of the same question in any other proceeding (b)

Sub-sec (4). A certificate should not be granted to several persons jointly as that would frustrate the object of the Act, so the Court should determine which of such persons has the best title to the certificate (c). This sub section lays down that where there are more applicants than one for a certificate, the Judge should select one on a consideration among others of the extent of interest (d) and the fitness of the applicants (e). The person having the largest interest in the estate, if otherwise unobjectionable, is entitled to a certificate, and security may be demanded of him for the protection of any other (small) interest (f). Proximity of kinship and residence are not such considerations as should warrant a Judge in granting a certificate to any person in preference to another who has *prima facie* the better title to the beneficial ownership of the debts (g). A certificate cannot be refused on the ground that the petitioner is likely to squander the property and the Judge cannot direct the money to be kept in deposit in a Bank (h). Where the question to be decided is intricate, it is the duty of the Judge to determine which of several applicants appeared to him to be the person having *prima facie* the best title (i).

Illustrations A husband and cousin has been preferred to a cousin (j); a widowed daughter claiming under her father's will which was not disputed, to his other representatives (l); sons of a deceased daughter to a widowed childless daughter (l); the husband a brother of a deceased woman to her sister's son (m); father's brother's son to father's brother's daughter's son (n); the nephew to deceased daughter's son (o), an adopted son of a person to the executor under the will of the father of that person (p), illegitimate sons to the childless widows of brother and nephew, there being evidence of the deceased having assigned his property to the former (q). A preceptor or disciple or spiritual brother of a deceased ascetic is entitled to a certificate in respect of debts due to the endowment and not

- (a) *Jigri Begum v Syed Ali* 5 C. W. N. 594, but see *Phundan v Arya P Sabha* 33 A 793, 111 C 261
 (b) *Rattan Singh v Raj Singh* 68 I C 302, see *Abdul v Jajarab* 31 Bom. L. R. 1093, 1097, *Kahn Debi v Salamat Rai*, 126 I. C. 410
 (c) *Madan v Ramdai*, 5 A. 195, *Jemnabai v Hastubai*, 11 B 179; *Lonachand v. Uttamchand*, 15 B 624. See S 370 note
 (d) *Shitab Debi v Debi Prasad*, 16 A 21, see *Ram Golam v Jankee*, 25 W. R. 31, *Abdul v Jajarab*, 31 Bom. L. R. 1093 (a party aggrieved by the order can challenge it in Civil Court)
 (e) *Hariboo v Purn Dhun*, 12 W. R. 356.
 (f) *Azeem v Ameeran*, 12 W. R.

- 38; *Rasunntissa v Hajjorunntissa*, 13 W. R. 143.
 (g) *Re Oodjichum* 4 C. 411
 (h) *Shih Debi v Ajilji*, 9 I C 571
 (i) *Shitab Debi v Debi Prasad*, 16 A 21
 (j) *Gadali v Wadedali*, 23 W. R. 25
 (k) *Chundoo v Rashi Belaree* 21 W. R. 24
 (l) *Pramila v Chandra Sekhar*, 43 A 450 67 I C 771
 (m) *Mullan v Ramaswami*, 16 M. L. J 559
 (n) *Gopal v Haridas*, 11 C 343
 (o) *Aree Muidun v Jannath*, 15 W. R. 325
 (p) *Dena Mojee v Doorga*, 3 W. R. 11, 6
 (q) *Prodhan Ram v Must Jaria*, 17 W. R. 16)

for the certificate, and may thereby empower the person to whom the certificate is granted—

(a) to receive interest or dividends on, or

(b) to negotiate or transfer, or

(c) both to receive interest or dividends on, and to negotiate or transfer,

the securities or any of them.

The section. This section sets out the contents of an order granting a certificate. The court should specify the debts and securities in respect of which the certificate is granted as also the nature of authority conferred on the applicant. The provisions of the section have to be strictly complied with. Thus a certificate, in which the debtor's column was filled in with the words, "From other persons," and the amount column with "Rs 600," was held to be irregular as under this section the certificate, when granted, must specify each debt and security covered by it (a). The restriction on the power of the applicant to deal with interest or dividend only is confined to securities only. Therefore where a Court ordered, "the certificate asked for is granted with the condition that the applicant may not disturb the capital sum and shall draw interest only" (b), the order was held to be bad. The Court could require as a condition precedent the giving of security but not restrict the widow to the recovery of interest only on debts. Restriction of the right of the widow to the recovery of only the interest on securities may be set aside by a declaratory suit (c). A judge can, in the exercise of his discretion, empower the holder of a certificate to negotiate a security (d). As to what is security see S 370. Amount in deposit in a bank is not security (e).

375. (S C 9). (1) The District Judge shall in any case in which he proposes to proceed under sub-section (3) or sub-section (4) of section 373, and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as

(a) *Maung Tha v Maung Hlaw*, 8 I C 996.

(b) *Jai Del v Banwari Lal* 35 A 249, 11 A L J 248, but see *Re Bldja Soandtee*, 15 W R

(c) *Keshoram v Ram Kuar*, 32 A 316 7 A L J 311

(d) *Re Bhuggobulky*, 3 W 18

(e) *Gulraj v Jugdeo* 1

is only against loss to themselves that they are being required to give security (a) and it does not protect the contingent interest of reversionary heirs (b) Thus it has been repeatedly laid down that security should not be demanded simply because the applicant happens to be a Hindu widow (c) In the absence of special circumstances rendering the taking of security necessary (d) Failure to furnish security is no ground for refusing a second application where the grant of security was not made a condition precedent (e)

Sub sec (2) This sub section provides for assignment of a security bond by the District Judge on the application of a party to enable him to sue on the bond There is no privity between the surety and the persons for whose benefit it is granted and therefore they cannot sue on the bond without an assignment from the District Judge (f) The Judge ought not to dismiss an application for assignment of a security bond to enable a party to sue on it without enquiry (g) as to the mode in which the security is to be enforced (h)

Court fees A security bond must bear a court fee stamp (i)

Appeal The Allahabad and Bombay High Courts have held that no appeal lies from an order granting a certificate conditionally on the applicant furnishing security, as it is an interlocutory order (j) But the Calcutta Madras and Punjab High Courts have held that an appeal lies (k) No appeal lies regarding the amount of security (l)

Review The High Court can interfere with the discretion exercised by the District Judge in the matter of taking security if the court of first instance has improperly exercised its discretion i.e. if it has acted illegally or with material irregularity (m)

376 (S. C 10) (1) A District Judge may, on the

Extension of certificate under this Part, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or

(a) *Porna Koer v Chunni Lal*, 14 A L J 654 35 I C 718

(b) *Parson v Somnath* 5 Bom L R 929

(c) *Kausilla v Sukhdei* 21 A L J 452 74 I C 761 *Chinnaswami v Ponna* 28 I C 638

(d) *Narain v Parameshwarai* 40 A 81

(e) *Porna v Chunni* 14 A L J 654 35 I C 718

(f) *Mayan v Chathappan* 14 M 473

(g) *Sukumari v Protap* 24 C W N 1311

(h) *Kamini v Hiralal* 23 C W N 769

(i) *Reference &c* 42 C. L J 5 F B *Dwarkanath v Sailaja* 21 C W N 1150 overruled

(j) *Bhagwan v Manni Lal* 13 A

214 *Bai Deokore v Lalchand* 19

B 790 *Nannhu Mal v Gulabo*

26 A 173 see also *Gaun v*

Maikla 2 A L J 606 fold in

Jasoda Bai v Sujannal 63 I C

846

(k) *Radharani v Brindaban* 25 C

320 2 C. W N 59 *Anya Pillai*

v Thangammal 20 M 442,

Venkalasami v Chenna 5 M L

J 28 *Bai v Barkhurdar* 4 I C

639 4 P L R 1909, per contra

Sundrammal v Kullappa 5 M L

J 36

(l) *Rajmolunie v Denobundhoo* 17 W

R. 566

(m) *Ba Deokore v Lalchand* 19 B

790

to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder.

The section The taking of security under this section is discretionary in some cases and compulsory in others (a) Sub sec (1) makes it compulsory for the District Judge to require a security bond with one or more sureties as a condition precedent to the grant of a certificate in two cases viz (1) where on account of some intricate and difficult question of fact or of law the grant has been made to the person having *prima facie* the best title thereto (b) or (2) where there are several applicants and the grant has been made to one having regard to the extent of his interest and his fitness in other respects (c) In these two cases the Judge shall require security to be given as a condition precedent to the grant therefore he has no discretion in the matter (d) In other cases the taking of security is discretionary & e It will be demanded if necessary (e) The section therefore renders it obligatory in some cases and leaves it optional in others to take security (f) Security is taken under this section for rendering an account of the debts and securities realised by the certificate holder and for indemnifying the persons who may be entitled to the whole or any part of the debts or securities (g) Where security is necessary the Court will grant a certificate conditional on the furnishing of security If security be unnecessary the grant will be made unconditionally (h) The amount of security should be specified in the order and a time should be prescribed within which the security must be furnished (i) Whenever the Court considers it desirable to take security from the applicant or where the taking of security is compulsory it shall require him to execute a bond with two sureties (j) The amount and nature of the security is to be determined by the District Judge (k) and if necessary the High Court would direct the District Judge to take the bond with one or more sureties (l) Where the applicants are persons beneficially interested only a nominal security should be required for it

(a) *Abdul v Jayaraj* 31 Bom L R 1093

(b) S 373 (3)

(c) S 373 (4) *Rajam v Edalapalli* 14 I C 303 see *Bhagwan v Manni* 13 A 214 *Bal Deckore v Lalchand* 19 B 790 *Champalal v Laherbat* 57 I C 641 *Gulab Chand v Moll* 25 B 523 3 Bom L R 795 *Narain v Parameshwari* 40 A 81 42 I C 941 *Azeem Khan v Ameerun* 12 W R 38 C R *Sundammal v Kullappa* 5 M L J 36
d *Rajam v Edalapalli* 14 I C 303 11 M L T 334 *Bal Deckore v Lalchand* 19 B 790 *Narain v Parameshwari* 40 A 81

(e) *Jal Del v Banwari* 35 A 249

(f) *Bri v Ba khurdar* 4 I C 639

(g) *Jal Del v Banwari* 35 A 249
Rajam v Edalapalli 14 I C 303
Parson v Somnath 5 Bom L R 929

(h) *Jal Del v Banwari* 35 A 249
Mayan v Chathappan 14 M 473

(i) *Gulraj v Jugdeo* 28 A 477

(j) *Parson v Somnath* 5 Bom L R 929
Rajam v Edalapalli 14 I C 303
Champalal v Laherbat 57 I C 641

(k) *Gulabchand v Moll* 25 B 523
3 Bom L R 795

(l) *Rajam v Edalapalli* 14 I C 303

is only against loss to themselves that they are being required to give security (a) and it does not protect the contingent interest of reversionary heirs (b). Thus it has been repeatedly laid down that security should not be demanded simply because the applicant happens to be a Hindu widow (c), in the absence of special circumstances rendering the taking of security necessary (d) Failure to furnish security is no ground for refusing a second application, where the grant of security was not made a condition precedent (e)

Sub sec. (2). This sub section provides for assignment of a security bond by the District Judge on the application of a party to enable him to sue on the bond There is no privity between the surety and the persons for whose benefit it is granted and therefore they cannot sue on the bond without an assignment from the District Judge (f) The Judge ought not to dismiss an application for assignment of a security bond to enable a party to sue on it without enquiry (g) as to the mode in which the security is to be enforced (h).

Court-fees. A security bond must bear a court fee stamp (i)

Appeal. The Allahabad and Bombay High Courts have held that no appeal lies from an order granting a certificate conditionally on the applicant furnishing security, as it is an interlocutory order (j) But the Calcutta Madras and Punjab High Courts have held that an appeal lies (k) No appeal lies regarding the amount of security (l)

Review The High Court can interfere with the discretion exercised by the District Judge in the matter of taking security if the court of first instance has improperly exercised its discretion, i.e. if it has acted illegally or with material irregularity (m)

376. (S. C 10) (1) A District Judge may, on the

Extension of cer application of the holder of a certificate
tificate under this Part, extend the certificate to any
debt or security not originally specified therein, and every
such extension shall have the same effect as if the debt or

(a) *Porna Koer v Chunnit Lal*, 14 A L J 654, 35 I C 718

(b) *Parson v Somnath*, 5 Bom L R 929

(c) *Kausilla v Sukhdei*, 21 A L J 452, 74 I C 761 *Chinnaswami v Ponna*, 28 I C 638

(d) *Narain v Parameshwari* 40 A 81

(e) *Porna v Chunnit Lal* 14 A L J 654, 35 I C 718

(f) *Mayan v Chathappan*, 14 M 473

(g) *Sukumari v Protap*, 24 C W N 1221

(h) *Kamini v Hiralal* 23 C W N 769

(i) *Reference, &c.* 42 C L J 5 F B. *Dwarkanath v Sailaja*, 21 C. W N 1150 overruled

(j) *Bhagwani v Manni Lal* 13 A

214, *Bai Deakore v Lalchand* 19 B 790 *Nannhu Mal v Gulabo*, 26 A 173, see also *Gauri v Maikia*, 2 A L J 606, fold in *Jasoda Bai v Sujanmal*, 63 I C 846

(k) *Radharani v Brindaban* 25 C. 320, 2 C W N 59, *Ariya Pillai v Thangammal* 20 M 442, *Venkatarami v Chinna* 15 M L J 28, *Bui v Barkhurdar*, 4 I C 639, 4 P L R 1909, per contra *Sundrammal v Kullappa*, 5 M L J 36

(l) *Rajmolunte v Denobundhoo* 17 W R. 566

(m) *Bai Deakore v Lalchand*, 19 B 790

security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in section 375 may be required, in the same manner as upon the original grant of a certificate.

The section. The section states that a certificate may be extended to a debt or security not covered by the original certificate and that the extension may be made subject to the same conditions as the original grant including the taking of fresh security. Under this section Court can only extend a certificate on the application of the holder of the certificate and it has no jurisdiction to grant extension to a person who is not the holder of the certificate (a). Amendment of a certificate is different from extension. Amendment will be allowed to correct a misdescription of a debt but not to substitute one kind of debt for another (b).

Court fees. See Sched I, Art 12, Court Fees Act (c)

Appeal. An order granting an extension of a certificate to additional debts is not appealable under 384 (d), but an order refusing to grant an extension is appealable under that section (e)

377. (S. C. 11). Certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in Schedule VIII.

Forms of certificate and extended certificate.

378. (S. C. 12). Where a District Judge has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge may, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring ~~as~~ the powers mentioned in section 374 or by substituting no for any other of those powers.

Amendment of certificate in respect of powers as to securities

- (a) *Raja Damara v Rama*,
L. J. 456 3 I. C. 84
(b) *Sunder Singh v. Karam Singh*
I. C. 479
(c) *Venkateswarulu v Bhalmaraculu*
M 634

(d) See *Re*
1125, 3
v. Karam
Radharani
N 947,

20 C. W.
Sunder
I. C. 47
27 C

The section The section empowers the District Judge, on cause being shown to his satisfaction, to amend a certificate by conferring enlarged powers of dealing with securities to the holder of a certificate. The judge has a perfect discretion to refuse to amend a certificate, *e.g.*, where an application is made by the guardian of a minor who does not propose to give any security (a). The section does not deal with formal amendments which a Court has inherent power to make. Thus a Court can amend a certificate in order to correct a misdescription of a debt but not to substitute one kind of debt for another (b). This section also does not authorise the court to direct the corpus of a fund to be deposited in a Bank and restrict the right of the holder to the receipt of interest only (c).

379 (S. C. 14) (1) Every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, in respect of the certificate or extension applied for.

Mode of collecting Court fees on certificates

(2) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

(3) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

The section Sub-section (1) requires every application for a certificate to be accompanied by a deposit of a court fee (d). Therefore if on the death of a person his widow obtains a certificate and then on the widow's death his daughter applies court fee has to be paid over again by the daughter (e). Sub-section (2) states that if the application be allowed ~~an~~ an order is made for a grant of a certificate the sum in deposit becomes at once legally appropriated as duty to the extent of the debt covered by the order but if no order for a grant be made, then a refund of the sum deposited will be ordered (f). Any surplus left after appropriation as stated in sub-section (2) is to be refunded to the person who deposited it.

Court fee Schedule I Arts 12 and 12A of the Court Fee Act (VII of 1870) prescribes the amount of duty to be paid in respect of a grant of a certificate. Art 12 has been amended under the Devolution Act (XXXVIII of 1920) by local enactments of the various provinces. It has been amended in Bengal by Act IV of 1922, in Bombay by Act III of 1926, in Bihar and Orissa by Act I of 1922 and in Madras by Act V of 1922. Art 12A dealing with a certificate under

(a) *Re Radhaballabh* 8 C. 302.
 (b) *Sunder Singh v Karam Singh* 110 I C. 479
 (c) *Sh b Del v Ajadhya* 9 I C. 571

(d) See *Re Dhanpat* 17 W. R. 489
 (e) *Re Sarajbashi*, 20 C. 1125, 36 I C 125
 (f) *Sanjara v Nainar* 21

the Regulation of the Bombay Code No VIII of 1827 has been amended by Act VII of 1910 S 2 Court fee is payable on the outstanding portion of the debt (a)

380 (S. C. 15) A certificate under this Part shall have effect throughout the whole of British India,
Local extent of certificate

381 (S. C. 16) Subject to the provisions of this Part, the certificate of the District Judge shall, with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted
Effect of certificate

The section The effect of a certificate is defined in this section Compare Ss 220 and 227 The certificate is conclusive of the legal title of the holder against all debtors of the deceased (b) so that they or their heirs are debarred from questioning the title of the certificate holder (c) The certificate is merely an authority to the person who obtains it to represent the deceased for the purpose of collecting the debts due to him or payable in his name (d) It does not entitle the holder to recover possession of the properties either movable or immovable (e) or to an order under S 530 of the Criminal Procedure Code declaring him to be in possession (f) Even if another person turn out to be the heir of the deceased it does not follow that the certificate is invalid (g) Secondly, payment by a debtor to the holder of the certificate is a valid and sufficient discharge of the debt (h) A certificate therefore operates to the benefit of the debtor because it protects him from a claim for the sum being made by a person other than the holder of the certificate (i) and affords him full indemnity as regards all payments made or dealings had with the holder of the certificate (j) A certificate enables the grantee to prosecute a claim as a

- (a) *Muhammad Ali v Pultan Bbi* 19 A 129
(b) *Bhugobully v Bholanath* 8 W R 317, *Muthiah v Ramanatham* 43 I C 972 *Rupan v Bhagelu* 36 A 23 25 I C 320 *Peare Lal v Jhakba Lal* 82 I C 604 *Golam v Tasardak* 28 C L J 279 46 I C 893 *Gunindra v Jugmala* 30 C 581 *Mahomed v Sharifan* 15 C L J 384 *Oriental & Assurance Co v Ventedu* M 162 *Asmat Ali v Silla* 19 A L J 766
(c) *Asmat v Silla* 9 A L J 16 I C 108
(f) *Gouree v Lochun* 22 W R 10

- Jhanjoo v Dameenah* 17 W R 343
(e) *Mahabir v Lal Datto* 1 I C 205
(f) *Anuragee v Rar* W R Cr R 16
(g) *Farmanandachar* M L T 611,
(h) *Muthiah v Rar* 972, I C 641
A 374 *Bal* 119
Sarajal v
Golam v Tasa
279 46 I C
v *Bholanath* 8

representative of the deceased with greater advantage than he would have been able to do in the absence of the representative right (a)

Where a debtor has paid the debt before the grant of the certificate to the person really entitled to the debt (other than the holder of a certificate), it affords complete defence to the suit by the certificate holder. The only effect of this section is that if the debt remained unpaid upto grant of the certificate the certificate is conclusive and compels the debtor to pay it to the certificate holder (b).

Position of a certificate holder. The grant of a certificate does not establish the title of the grantee as the heir to the deceased but only furnishes him with an authority to collect the debts and allows debtors to make payments to him without any risk (c). The right of the holders of a certificate to realise debts or to execute decrees in case of judgment debts cannot be challenged by the debtors (d). The holder of a succession certificate who has to collect the debts due to the estate of a minor cannot be compared to a certificated guardian. Such a certificate holds good until the minor takes steps to have it revoked on coming of age so it does necessarily become invalid on the minor attaining age (e). The holder of a certificate cannot compromise a claim without the intervention of the Court (f).

What a certificate does not establish. A certificate cannot determine any question of title or decide what property belongs to the estate of the deceased (g). (See in this connection S 387). A regular suit has to be brought in order to determine the right or title to any specific property (h). The Judge in an application for a certificate is not competent to go into the question of title of rival claimants (i). A certificate gives no title to the property in succession to the deceased and it does not authorise the holder to sue for and collect debts which accrued due after the death of the deceased to persons who subsequently thereto became owners of the property which originally had belonged to the deceased (j) nor to collect debts due to third parties (k). The receipt of money under a certificate does not give a title to the money but the holder only becomes a quasi-trustee for the person to whom it belongs (l). The certificate does not give any general power of administration to the estate of the deceased (m). A grant of certificate does not constitute proof of the debt

(a) *Brojendra v Nalad Inath* 57 C 814 33 C W N 1177

(b) *Kachu Iyer v Vengu* 50 M L J 432 93 I C 360 *Punkallam v Ranchhod* 8 B H C R 152 A C J fold *O nial & c v Vantedu* 35 M 162 reld to

(c) *Ram Saran v Gappu* 33 I C 603

(d) *Peare Lal v Jhabba Lal* 82 I C 604 *Gaura v Gayad n* 4 A 355

(e) *Ganpaya v Krishnappa* 26 Bom L R 491 80 I C 422

(f) *Ganpaya v Krishnappa* 26 Bom

L R 491

(g) *Waselun v Gowhuroon ssa* 10 W R 105

(h) *Imamun v Nunnoo* 17 W R 193 *Gundra v Jugmala* 30 C 581

(i) *Bhuggobully v Bholanath* 8 W R 317

(j) *Gotee v Lochun* 22 W R 102

(k) *Bai Kashi v Parbhu* 28 B 119

(l) *Gobind v Doorga* 23 W R 27 C. R. *Abdul v Jagarbai*

Bom L R 1093

(m) *Charus la v Jyotish* 33

nor does it determine the frame of the suit in which the claim is enforced (a) The grant of a certificate does not establish the title of the grantee as the heir of the deceased (b), so that the debtor may allege that the grantee is not the heir of the deceased and also that the deceased held the property as trustee for other persons (c)

What cannot be tried in certificate proceedings It has been stated before that no nice questions of law as to the rights of the parties can be decided on an application under it therefore, the strict rights of the parties cannot be adjudicated upon where it involves the determination of intricate and difficult questions (d). A decision as to the validity of a will in certificate proceedings will not bar a regular suit (e) Where, however, a question has been dealt with with all the available evidence as in a regular suit before a certificate is granted, no doubt a regular suit will lie in respect of the question, but that suit in such a case will be a mere re hearing and the Court trying it is bound to pay due respect to the judgment already arrived at (f) The Court is not required to hold an elaborate enquiry into the existence of any debt alleged by the person applying for a certificate as a preliminary condition of the grant, but the question will be tried in a suit brought by the grantee seeking to recover the debt (g) When the object of an applicant for a certificate is to obtain a decision on a question of Hindu law, viz, his heirship, it will be refused (h) A suit for a bare declaration by a member of a joint Hindu family under S 42 of the Specific Relief Act that he is entitled to collect the debts standing in the name of the deceased member is maintainable, although a certificate has been granted to the widow of the deceased, for a certificate does not in any way interfere or limit the rights of any one to bring any suit which he is entitled to bring (i).

In good faith The expression has been defined in the General Clauses Act thus — "A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not" Therefore even if a payment be made by a debtor without due care and caution still if it was made honestly, it will be payment in good faith (j) Where on the death of a person there was a dispute between his widow and brother in respect of a debt and a certificate was granted to the widow but she was restrained by injunction in subsequent litigation from collecting the debt for a certain period, on the expiry of that period, a debtor refusing to pay was held not to have acted in good faith (k)

- (a) *Malomed v Sharifan* 15 C L J 384
 (b) *Ram Saran v Gappu Ram* 33 I C 673
 (c) *Bundhos v Syed Mahomed* 2 W R 70 C R, *Peare Lal v Jhalala Lal* 62 I C 604
 (d) *Ganindra v Jugma'la* 30 C 531, *Kutcer v Ramkanye* 17 W R 174 C R
 (e) *Kalee v Gokind* 12 W R 454, *Jirund v Indramanee* 16 W R 214
 (f) *Goodhater v Foolshater* 24 W R

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 (g) *Bal Kashi v Parbhu* 23 B 119
 (h) *Huro Kisho v Ram Nundo*, 22 W. R 274, see *Jhanjoo v Darzenah*, 17 W R 343
 (i) *Chinnappa v Thulasi*, 15 M L J 399, *Russlek v Ram Lall*, 22 W. R 301
 (j) *Agent, M S M Ru Co v Gangarimal* 109 I C 696
 (k) *Sihamkaradcu v Thirupalkand*, 39 M L T 405 10, I C 125

382 (S C 17) Where a certificate in the form, as
 Effect of cert nearly as circumstances admit, of Schedule
 ficate granted or ex VIII has been granted to a resident within
 tended by British ~~State or the British representative~~

Section 382 as applied to the Ry. lands in
 Rajputana and Central India, under the
 Rajputana and Central India Railway Lands
 (Application of Laws) Order, 1937.

382. Where a certificate in the form of
 Schedule VIII to this Act has been granted und
 the provisions of this Act by a Court having
 jurisdiction under the Act in British India or
 under the Act as applied in any area outside
 British India which is under the administrati
 of the Crown Representative, or when a cer^t f^t
 in the form, as nearly as circumstances admit,
 the said schedule has been granted to a resi
 within a foreign State by the British Represen
 tive accredited to the State, or when a cer^t f^t
 cate so granted has been extended in such form
 by such Court or by such representative, the
 certificate shall, if it has been stamped in
 accordance with the provisions of the Court-f-
 Act, 1870, have the same effect as a certific
 granted ~~in~~ or extended under this Act.

(b) that the certificate was obtained fraudulently by the
 making of a false suggestion, or by the concealment from
 the Court of something material to the case,

(c) that the certificate was obtained by means of an untrue
 allegation of a fact essential in point of law to justify the
 grant thereof, though such allegation was made in ignorance
 or inadvertently,

(a) See *Manasing v Amad Kunhi* 17
 M 14

(b) *Manasing v Amad Kunhi* 17 M
 14 See *Murli Das v Achut Das*
 (Resident merely forwarded in due
 course a certificate granted by Ja pur

State)

(c) *Ammunni v Krishna* 16 M 405

(d) *Annapurnabai v Balacanthrao* 19
 B 145 (Improper stamp not being
 marked 'Court Fees' did not affect
 the certificate)

(d) that the certificate has become useless and inoperative through circumstances ;

(e) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

The section. The section sets out the grounds for revocation of a certificate. Similar grounds for revocation of probate or of letters of administration are set out in S 263. The revocation can be made at any time when the circumstances enumerated in the section are proved irrespective of the finality of the grant by reason of no appeal having been filed against the same (a) The exercise of the transfer by the certificate holder of the corpus of a debt should not necessarily be followed by a revocation of the certificate (b)

Cl. (a) Failure to cite a necessary party to the proceeding (c), or to serve citation on the guardian where his interest is adverse to that of the minor (d) or omission to supply a list of debts (e), has been held to make the procedure defective in substance within the meaning of this clause Where however notice has been served on a party but he does not appear and object to the application, the proceeding cannot be regarded as being defective in substance (f) Where a notice sought to be served on a party has been returned with the endorsement "refused" the party was allowed to appeal against the *ex parte* order granting a certificate, it being held that it was not incumbent on him to apply for revocation of the certificate (g)

Cl. (b). A false suggestion regarding residence of the deceased which affects the jurisdiction of the Court (h), or a false and fraudulent statement *eg*, that the deceased died without a wife and without issue (i) is a good ground for revocation under this clause But the mere existence of an heir of a nearer degree is no ground of revocation (j) Under S 44 of the Evidence Act, a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud The grant may be revoked on the Court's own motion in certain cases, but as a general rule, the Court must be moved by the parties interested in the revocation to exercise its authority (k) The

- (a) *Sukhta v S S for India*, 21 A 154
 (b) *Rung Lal v Annu Lal* 11 A L J 969
 (c) *Damini v Fatumani* 79 I C 637
 (d) *Sharifunnissa v Masoom Ali*, 42 A 347
 (e) *Mir Fayaz v Taleb Ali*, 18 W. R 339 (certificate suspended by High Court under Act XXVII of 1869).
 (f) *Manick v Raj Lucktee* 19 W R 232 C R
 (g) *Bhinda v Rathe Lal*, 42 A 512 56 I C 181
 (h) *Hameeda Bee v Noor Bee* 9 V R 374 C R, *Jaggannath v*

- Bhugobutt*, 14 W R 464 C R
 (i) *Re Dhabada* 8 B L. R 13 appdx
Damini v Fatumani, 79 I C 639
 (j) *Kubeer v Ramkanya* 17 W R 174 C R
 (k) *Manchharam v Kalidas* 19 B 821, *Sheo Punshun v Collector &c.* 13 W. R 256 C R, but see *Venkatalamma v Chengalraya* 7 M 555 (But the question of inherent power of revocation is of academic interest now as express power has been given to Courts by this section a power they did not possess under Act XXVII of 1869)

Court ought to make an enquiry where a false and fraudulent allegation has been made (a)

Cl. (c) Where after the grant of a certificate a will is produced and admitted to probate the certificate will be revoked (b)

Cl (d) As to the meaning of the words 'become useless and inoperative' see *Bal Gangadhar v Ganesh* (c) Where a claimant of a part of a dower debt obtained a certificate for the entire amount of dower due to the deceased and sued for the recovery of his share only and obtained a decree when another claimant applied for a certificate held the circumstances had so changed since the grant of the certificate as to bring the case within the operation of this clause or of the next and it should, therefore be revoked (d) A certificate cannot be cancelled on the ground that the property is of considerable value and it is more desirable that a regular suit should be brought (e)

Cl (e) This clause applies when an application is made to revoke a certificate on the ground that a decree or order of a competent court has already been obtained in some proceeding in respect of effects comprising debts or securities specified in the certificate The grant of a certificate of course is no bar to the bringing of such a suit as is contemplated by the clause It is not necessary that the court in which the revocation is sought should be competent to entertain the suit (f)

Jurisdiction This section does not specify the jurisdiction of the Court in the matter of revocation of a certificate but S 389 seems to indicate that ordinarily the revocation must be made by the Court which granted the certificate provided of course the Court granting the certificate is still exercising jurisdiction in the district A district judge therefore cannot revoke a certificate granted by a sub judge invested with the powers of a district court in certificate cases (g)

384. (S C 19) (1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908

- (a) *Bheekun v Elahee* 11 W R 153
C R
(b) *Re Adja* 11 I C 261
(c) 26 B 792
(d) *Sharifunnissa v Masum Ali*, 42 A. 347 56 I C 350
(e) *Kahn Dett v Salamat*, 126 I C.

- 440
(f) *Chinnappa v Tulasi*, 15 M L J 399 see observations in *Sharifunnissa v Masum Ali* 42 A 347
(g) *Sukhia Bawa v S S*
19 C W N 551

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, an order of a District Judge under this Part shall be final.

The section. Under this section an appeal lies to the High Court from an order of a District Judge granting refusing or revoking a certificate and it is not absolutely incumbent on the appellant to make an application to the Court granting the certificate to revoke it (a) The section also reserves the revisional powers of the High Court as supplementing its appellate jurisdiction

Where an appeal lies An appeal lies from an order granting separate certificates to different persons for partial collection of debts (b) or from an order granting a certificate where no notice of the proceedings was served on a party interested (c)

An order refusing to grant a certificate is also appealable (d), even where the order is that of the agent to the Governor General (in certain agency tracts) who under Act XXIV of 1839, S 3 and rule 10 (4) is constituted the Judge of the principal civil court of original jurisdiction (e) An order refusing to grant a certificate in respect of a part only of a debt due to the deceased (f), or an order refusing to extend a certificate to debts not originally specified therein (g), is also appealable An order refusing to revoke a certificate granted to a person is appealable as it is in effect an order refusing to grant a certificate to the second applicant (h)

Where no appeal lies An order granting a certificate conditionally on the applicants furnishing security is not an order "granting, refusing or revoking a certificate," and therefore no appeal will lie therefrom (i) Accordingly no appeal will lie from an order requiring security (j) or as to its insufficiency (k) or as to its amount (l) In some cases (m) however a conditional order like the

(a) *Bindo v Radhe Lal* 42 A 512,
Chandharan v Naubahar, 29 A L
J 260 130 I C 3

(b) *Shitah Del v Debi Prasad*, 16 A.
21

(c) *Bindo v Radhe Lal* 42 A 512

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(e) *Bahubalendruni v Chandrasekharaju*
31 M 362

(f) *Annapurna v Nalni* 42 C 10,
23 I C 556

(g) *Radha Raman v Gopal*, 27 C
W N 947, *Venkatapurulu v*
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(h) *Shailunnai v Masum Ali* 42 A
347 *Alanchharam v Kallidasa* 19
B 821 825, but see *Anul v*
Lalla 6 C 40

(i) *Devi v Lalchand* 19 B

790, *Bhagwant v Manni Lal* 13
A 214, *Nannhu Mal v Gulabo*

26 A 173, *Sundrammal v Kullappa*
5 M L J 36 *Gauri v Makla*

2 A L J 606

(j) *Rama v Papi* 19 M 197;
Monmohinee v Khetter I C 127

Bai Nandkore v Sha Alaganlal
36 B 272 (head note misreading)

Re Padlo Sundari 3 A 304
Krishna Kumari v Naubahar, 130
I C 3

(k) *Lucas v Lucas* 20 C 245

(l) *Alcoholine v Dina Bandhoo* 17 W
R 566

(m) *Radha Rani v Bindajun* 25 C
320, *Alilya v Thangammal* 20
M 442 *Venkatarami v Chinnu*
5 M L J 23

above has been treated as one coming under this section and accordingly appeals have been allowed, but these decisions have not found favour in subsequent cases (a) An order requiring fresh security to be given has been held not to be appealable (b) An order refusing to cancel a certificate is not appealable (c)

Estoppel Where the parties to a suit agreed to a certificate being granted to three persons, one of them, it was held, could not appeal against that order and contend that the certificate ought not to have been granted (d)

Interference by High Court. Where the District Judge "only exercised a discretion in demanding security, as he is entitled to do, this (the High) Court will not interfere on appeal with the exercise of his discretion" (e).

Review. There was apparently some doubt whether the Act of 1860 provided for a review in a certificate matter (f) but it is now expressly conferred by the section No appeal lies against an order rejecting an application for review of an order granting a succession certificate (g)

Revision The High Court can interfere in revision where the lower appellate court has failed to exercise a jurisdiction vested in it by law (h). As to what amounts to failure to exercise a jurisdiction see the leading case of *Ameer Hassan v. Sheo Baksh* (i)

385. (S. C 20). Save as provided by this Act, a certi-

Effect on certi-
ficate of previous
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tration

ficate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

The section A certificate will be invalid if the previous grant of a certificate or probate or letters of administration be in force (j). A fresh certificate can, however, be taken out on the death of the previous holder on payment of further Court fee (k) A certificate of heirship granted by a Political Agent, even though the procedure adopted in obtaining it be irregular, precludes a District Judge from granting a fresh one under this section (l)

(a) See *Jasoda v. Sufanmal*, 63 I C 846; *Nannhu Mal v. Gulobo*, 26 A 173

(b) *Alta Soondari v. Snnath*, 20 C 641

(c) *Chandharan v. Naubahar*, 29 A L J 200, 130 I C 3

(d) *Ran Raj v. Brij Nath*, 35 A 470

(e) *Sundrammal v. Kallappa*, 5 M L J 36; *Mhalsa Bai v. Vithoba*, 7 B. H. C. R. XXVI appdx

(f) *Re Poonakoer*, 1 C. 101, 24 W R. 376, *Hameeda v. Noor Beebee*,

9 W R 394 fold, *Siva v. Chenamma*, 5 M H C R. 417 distd from

(g) *Narain v. Parmeshari*, 40 A. 81, 40 I C. 124, see *Nissa Bibee v. Abdoor*, 18 W. R. 413

(h) *Bai Deckore v. Lalchand*, 19 B 793

(i) 11 C 6 P C

(j) *Hari Chand v. Hargopal*, 125 I C 322.

(k) *Re Saraje*, 20 C. W. N 1125

(l) *Annapurnabai v. Lokshman*, 19 B 145

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(d) *Ram Raj v Brij Nath*, 35 A 470

(e) *Sandrammal v Kallappa* 5 M. L. J 36, *Mhalsa Bai v Vihola*, 7 B H C. R. XXVI appdx

(f) *Re Poonchoor*, 1 C. 101, 24 W. R. 376, *Hamreda v Noor Beteer*,

9 W. R. 394 fold, *Sicu v Chenamma*, 5 M H C R. 417 dissd from

(g) *Narain v Parmeshari*, 40 A. 81, 40 I C. 124, see *Nusa Bhee v Akdoor*, 15 W. R. 413

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(j) *Hari Chand v. Haripopal*, 125 I C. 322.

(k) *Re Sanje* 20 C. W. N 1125

(l) *Annaparnabai v Lakshman* 19 145

386. (S. C. 22). Where a certificate under this Part has been superseded or is invalid by reason of the certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named in an appellate order under section 384, or by reason of a certificate having been previously granted, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate

The section This section renders valid all payments made to or dealings had with the holder of a certificate as regards debts and securities specified therein even though the certificate has been superseded under the provisions of Ss 383 and 384 or is invalid as declared by S 383 provided the payments were made or dealings had in ignorance of the supersession or invalidity of the certificate Accordingly all persons who have *bona fide* paid or dealt with such a certificate holder are protected against claims under any other certificate (a) See S 297 as regards payments to executors or administrators under similar circumstances A debtor cannot refuse to pay on the ground that a suit regarding devolution of the deceased's estate is pending and he may have to pay twice over for a certificate affords complete indemnity to the debtor (b)

387 (S C 25) No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto

The section Proceedings under this part are of a summary nature and the only thing which the Court is required to decide in a summary manner is whether the applicant has a *prima facie* right to collect the debts (c) A grant of a certificate therefore does not establish the title of the grantee as the heir of the deceased (d) or to the debts and securities specified in the certificate Accordingly

(a) *Paramananda v. Veerappa* 107
1 C 431 39 M L T 611
(b) *S. Jambhara v. Thiruppal* 103 1 C
125 39 M L T 45
(c) *Ram Saan v. Goppu* 33 1 C
633 191 v. *Sel Ali* 5 C W
N 494

(d) *Ram Saan v. Goppu* 33 1 C
633 191 v. *Sel Ali* 5 C W
N 494

it is provided in this section that no decision under this Part shall bar the trial of the same question (*e.g.* of heirship or of title to debts and securities) in any other proceedings between the parties (a). The decision of the District Judge in the matter of a succession certificate and relating to the claims of the contesting parties is in no way final or binding between the parties (b).

388. (S. C. 26). (1) The Local Government may, by notification in the local official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge :

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either himself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area

(a) *Must. Lal v. Asharfi*, 88 I C. 612; *Mulji Das v. Ach* 5 Lah. 105, 92 I C. 138

(b) *Saheb Ram v. Gobind*, 60 I C. 774

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge

Appeal This section, *inter alia*, confers on the District Judge the same appellate jurisdiction over an order of an inferior Court as is conferred by S 384 on the High Court over the order of a District Court. The language of the section is peremptory. There is no provision in the Act for a second appeal in any case (a). Other courts subordinate to the District Court have no power to hear appeals in such cases (b).

The section. The section empowers the local Government to invest any Court inferior in grade to the District Judge with the functions of a District Court, and where an inferior Court is so invested, it has concurrent jurisdiction with the District Court in the exercise of all powers conferred by the Act upon the District Court. The power of an inferior Court so invested is not in certificate matters limited by its pecuniary jurisdiction in respect of other suits (c).

For Notification issued under this section see Local Rules and Orders, Assam Ed 1893, p 268, Bombay, Ed, 1896 Vol I p 495, Madras, Ed 1898, Vol I p 227, N W P & Oudh, Ed 1894, p 126

389. (S. C. 27). (1) When a certificate under this Part has been superseded or is invalid from any Surrender of superseded and in valid certificates of the causes mentioned in section 386, the holder thereof shall, on the requisition of the Court which granted it, deliver it up to that Court.

(2) If he wilfully and without reasonable cause omits so to deliver it up, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

The section. For similar provision as regards the surrender of revoked probate or letters of administration, see S 296

390. (S. C. 28). Notwithstanding anything in Bombay Regulation No. VIII of 1827, the provisions of section 370, sub-section (2), section 372, sub-section (1), clause (f), and sections 374, 375, 376, 377, 378, 379, 381, 383, 384, 387, 388 and 389 with respect to certificates under this Part and

(a) *Sutka Rao v Poljanand* 17 M 177, 4 M L J 71. *Hast v Satal* 21 L C 394. *Jatram v* 11 April 41 L C (4)

(b) *Haron Bai v Hangan Bai* 34 A 143, 6 A L J 1330
(c) *Raffan Singh v Rai Singh* 68 L C 33

applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be made applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thereunder, after the 1st day of May, 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

Appeal. An appeal lies from the order of the District Court refusing to grant a certificate of heirship under Reg VIII of 1827 by virtue of the provisions of this section (a) Costs of proceedings under the repealed and re enacted Succession Act should be taxed as before the Act of 1925 under the Bombay Pleadings Act, 1920 (Bombay Act) (b).

(a) *Javermal v Nazir, &c* 18 B 743
Isling Pitamber v Ishwar 17 B
230

(b) *Rajrajeshwarashram v Seerupan
tittha*, 29 Bom L. R 1031
I C 637

PART XI.**Miscellaneous.**

Savings.

391. (P. 149). Nothing in Part VIII, Part IX or Part X shall—

(i) validate any testamentary disposition which would otherwise have been invalid ;

(ii) invalidate any such disposition which would otherwise have been valid ;

(iii) deprive any person of any right of maintenance to which he would otherwise have been entitled ; or

(iv) affect the Administrator General's Act, 1913.

392. This section as also Schedule IX mentioned therein have been repealed by the Repealing Act XII of 1927. That Act expressly and specifically repeals a number of enactments which are spent or have otherwise become unnecessary. The repealed section ran as follows:

Repeals The enactments mentioned in Schedule IX are hereby repealed to the extent specified in the third column thereof.

ADDENDA

P 1, end Add A court is not at liberty to make laws or amend them, even where it is convinced that the draftsman has blundered or the legislature has overlooked a necessary provision, *Re Bholanath*, 58 C 801, 35 C W N 122

P 3 n 4 fn (g) Add *Re Ezra*, 58 C 761

P 4 n 1, end Add The presumption that the legislature did not intend to alter the law by an Act described as a consolidatory Act cannot override the plain meanings of the words used *Re Bholanath*, 58 C 801, 35 C W N 122

P 4 n 5, after (vii) Jews Add See *Re Ezra*, 58 C 761

P 5 Preamble n 5, end Add The Succession Act governs the succession to the estates of Chinese Buddhists whether born in China or born in Burma who were domiciled and died in Burma *Phan Tiyok v Lim Kyin* 8 Rang 57 See *Ma San v Ma Chit*, 127 I C 381 When the religion of a person is a fact in issue, his own solemn declaration in his will is admissible in evidence and is of great weight, *Leong Hone v Leon Ah*, 7 Rang 720

P 12 S 2 fn (j) Add *Ram Chhatra v Prince Shri Mohan*, 10 Pat 851, 35 C W N 953 P C (Suit for possession will be barred under S 120 Limitation Act)

P 14 S 2 n 27 (ii) after (c) Add But in a case where a husband and wife executed their wills simultaneously and in similar terms and in that sense mutually, the Privy Council held that a second will by one of them on succeeding to the estate of the other was effective in the absence of evidence of an agreement not to revoke the wills after the death of one of the parties No question of election arises in such a case if the testators dispose of their own respective properties, *Gray v Perpetual Trustee Co*, 26 A L J 1239 P C

P. 14 fn (g) Add *Shemast v Sheikh Ahmed*, 33 Bom L R 1056

P 17 S 4 n 3 para 1, end Add For a case of a Christian convert to Hinduism see *Ratanji v Morarji*, 53 M 160 55 M L J 340

P 18 S 4, after n 8 Add 9 Jews The Jews are governed by the Succession Act and not by their customary law, *Re Ezra* 58 C 761

P 49 S. 37 n para 2 after (a) Add The word child in the section does not include an illegitimate child, *Re Ezra* 58 C 761

P. 61 S. 57 n 7, end Add See *Umakanta v Biswambhar* 8 Pat 419 The Hindu Wills Act did not cease to be applicable to a place in which it was already in force by re distribution of territories, *Satyaranjan v Annapurna*, 48 C L J 523

P 61 S 57 n. 8, end Add A declaration of testamentary intentions to which effect was to be given by a written will cannot be regarded as an oral will as it cannot be inferred that there was the intention that the oral declaration should itself operate as a testamentary disposition of the declarant's property, *Venkat Rao v Namdeo*, 29 A L J 1131 P. C

P. 61 S 57 f n (i) Add *Krishnarao v Sundara Rao*, 35 C W N 617 P C

. PART XI.

Miscellaneous.*Savings.***391. (P. 149).** Nothing in Part VIII, Part IX or Part X shall—

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P. 12 S. 2 fn (j) Add *Ram Chhatra v Prince Shri Mohan*, 10 Pat 851, 35 C W N. 953 P. C (Suit for possession will be barred under S. 120 Limitation Act)

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P. 14 fn (g) Add *Shemal v Sheikh Ahmed* 33 Bom L R 1056

P. 17. S. 4 n. 3 para 1, end Add For a case of a Christian convert to Hinduism see *Ratansi v Morari*, 53 M 160 55 M L J 340

P. 18 S. 4, after n 8 Add 9 Jews The Jews are governed by the Succession Act and not by their customary law, *Re Ezra* 58 C 761

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P. 61 S. 57 n 8, end Add A declaration of testamentary intentions to which effect was to be given by a written will cannot be regarded as an oral will as it cannot be inferred that there was the intention that the oral declaration should itself operate as a testamentary disposition of the declarant's property *Venkat Rao v Namdeo*, 29 A L J 1131 P. C

P. 61 S. 57 f n. (i) Add *(K)* *o v Sundara Rao*, 35 C W N 61

P 62 S 57 n 11, end Add The mere fact that a son was born to the testator after the execution of the will is not sufficient to raise the presumption that the will was revoked *Efari v Podai* 55 C 482

P 86 S 61 n 6 after (1) Add Thus undue influence is not established merely by shewing that the eldest son was entirely disinherited and another son given the entire estate *Leong Hone v Leon Ah* 7 Rang 720

P 96 S 63 f n (f) Add *Thakur Shyam v Thakur Jagannath* 26 A L J 28 32 C W N 305 P C

P 111 S 69 l 1 after (a) Add or the factum of adoption *Raghbi v Rau* 132 I C 481 32 P L R 482 (if the property be ancestral the adopted son's right to inherit will prevail)

P 111 S 69 f n (a) Add *Efari v Podai* 55 C 482

P 119 S 70 para 3 after (f) add The doctrine of dependent relative revocation applies only when there is a revoking clause in the later will Prior wills would only be revoked by reason of and to the extent of its inconsistency with the later wills if the later wills effect nothing *ie* be inoperative the prior will must stand *Ram Charan v Gobinda* 49 C L J 421

P 129 S 73 f n (g) Add *Ram Chhatra v Prince Shri Mohan* 10 Pat 851 35 C W N 953 P C

P 130 S 73 f n (a) Add *Gooneewardene v Gooneewardene* 61 M L J 340

P 131 S 74 f n (e) Add *Bolo v Kollan* 11 Lah 657 28 A L J 1188 59 M L J 621 P C

P 132 S 74 n 4 after (a) Add The primary duty of a court of construction is to give the words of the will their plain and natural meaning Where the words of a will are specific the courts must construe the words as they find them *Bolo v Kollan* 11 Lah 657 59 M L J 62 P C

P 132 S 74 f n (a) end Add (Where a testator disposes of ancestral property it is not within the province of the court to speculate what he might have done had he known of the alleged mistake)

P 132 S 74 f n (b) Add *Natwar v Lax* 28 A L J 1391

P 132 S 74 f n (f) Add *Jio v Rukman* 8 Lah 219 (where the words are clear the will has to be construed according to the plain language)

P 137 S 74 f n (d) Add *Raghunath v Pratapgarh* 26 I A 372 27 A L J 1265 P C

P 170 S 83 n 5 (iv) end Add The words *malik o qabul* imply full ownership in property *Fitch Chand v Rip Chand* 31 C W N 102

P 170 S 83 Add *G Muhammad Ali in Law* The creation of a life estate does not seem to be consistent with Muhammadan usage and there ought to be clear proof of so unusual a transaction *Abadi Begari v Muhammad* 6 Luck 28 132 I C 753

P 170 S 83 f n (q) after 84 P C Add *Natwar v Lax* 28 A L J 1391 *Vandkishore v Pissajati* 7 Pat 396

P 174 S 87 f n (1) Add *Rajal Nath v Pratapgarh* 26 I A 372 27 A L J 1265 P C

P 176 S 88 f n (b) Add *Sityarnjan v Annapurna* 48 C L J 523 *Muharram v Barkat* 12 Lah 286 125 I C 886

P 176 S 88 f n (c) Add *Raghunath v Pratabgarh* 56 I A 372 27 A L J 1265 P C

P 181 S 89 f n (p) Add *Satharkh v Harital* 57 C 1025 gift for *punya-karye* (pious or pious and religious acts)

P 195 end S 93 n 2 Add The term heirs includes both male and female heirs, *Mir Safdar v Mirza Maksudali* 34 C W N 208 P C

P 200 S 95 n 1 after the words passes to the legatee Add *Abadi Begam v Mohammad* 6 Luck 282, 132 I C 753 (the will has to be construed as a whole and its import deduced in the ordinary way—absolute interest held to pass to widows and daughter)

P 200 S 95 n 1 end Add The section is made applicable to the will of a talukdar by the Oudh Estates Act 1869 S 19 *Abadi Begam v Mohammad*, 6 Luck 282 132 I C 753

P 202 S 95 n 6 (i) end Add This view is supported by the decision of the Privy Council in *Shah Ram v Charanjit* 32 Bom L R 1578 where it has been pointed out that it was at one time held by some of the courts in India that under the Hindu law, in the case of immovable property given or devised by a husband to his wife the wife had no power to alienate unless the power of alienation was conferred upon her in express terms. But it has been held by decisions of the Board that this proposition is not sound and that if words were used conferring absolute ownership upon the wife the wife enjoyed the rights of ownership without being conferred by express and additional terms unless the circumstances or the context were sufficient to shew that absolute ownership was not intended. But a leaning towards the older view is indicated in *Mohan Singh v Gur Dev*: 12 Lah 767, 131 I C 738

P 204 S 95 n 6 end Add There is no presumption of limited ownership in the case of gifts to females without words of inheritance particularly if the will be in English *Pramathanath v Suprakash* 58 C 77 *Bispradas v Sadhan* 56 C 790. In the case however of a gift to daughters in these terms—that they shall be my lawful heirs and they alone shall in equal shares become owners of all my properties subject to the provisions of this will the two daughters shall acquire all manner of rights consistent with Hindu law—the Privy Council held that the daughters acquired the interest of a daughter as recognised by Hindu law as has indeed been clearly indicated by the testator. The Privy Council observed that the circumstances of the testator referred to in his will and surrounding him at its date are not irrelevant upon the question of construction as to whether an absolute interest was conferred on the daughters. A power to alienate is an essential incident of an absolute interest in property *Joydurga v Saroj Panjan* 50 C L J 481

P 208 S 96 n 3 end Add Where a testator gave the income to his two son for life the corpus to go in equal shares to such persons as each of his two shall appoint and in default of appointment, to their heirs or legal represen

held the bequest conveyed an absolute estate in a moiety to each of the sons
Balthazar v Balthazar 31 C W N 992

P 210 S 97 f n (h) Add *Abadi Begam v Mohammad* 6 Luck 282 132 I C 53 765 (the words and your heirs or upon you and your heirs for ever are words of limitation and not of purchase and cannot therefore imply a grant of an absolute estate of inheritance)

P 217 S 100 n 8 end Add The word *santan* means issue and is not limited to male issue *Kumud v Jogendra* 31 C W N 854

P 238 S 106 f n (h) Add *Jio v Rukman* 8 Lah 219 (gift to several without specification of shares creates a tenancy in common), see cases cited

P 247 S 110 n end Add The Indian law speaking broadly, does not recognise the distinction between legal and equitable property *Tagore v Tagore* 1 A Sup Vol 47 71 *Webb v Macpherson* 30 I A 238 245 31 C 57, 72 Under that law therefore there must be one owner and where property is vested in a trustee the owner must be the trustee *Ram Chhatra v Prince Mohan* 10 Pat 851 P C

P 281 S 116 n 4 end Add Where a bequest was void because it infringed the rule laid down in S 113 a subsequent bequest was held not affected because it was not a bequest following a prior void bequest but was an alternative bequest *Dharsan Singh v Wali Khan* 116 I C 30

P 303 S 120 f n (g) Add A contingent interest is not affected by the invalidity of a prior bequest and a transfer of interest after the happening of the contingency is valid and binding *Ibid*

P 312 S 124 n 1 para 1 end Add In cases coming under this section the question is to ascertain when the fund bequeathed is payable or distributable *Satyaranjan v Annapurna* 48 C L J 523

P 313 S 124 n 1 end Add The rule laid down in the section is a rule of law and not of construction *Kamla Prasad v Murl* 94 I C 750

P 315 S 124 para 1 end Add A reference to death will prima facie refer to death at any time upon the wording of the will in suit the Privy Council regarded the reference to be to death in the lifetime of the testatrix *Suresh v Jyotirmojee* 33 C L J 129 35 C W N 61 59 M L J 394

P 316 S 214 n 6 end Add Thus where a testator provided that his wife along with his minor son was to enjoy the property jointly and in case the minor son dies before his mother then the latter shall be held and considered to be the owner of the said minor's half share in the entire property and the son attained majority and died it was held that the words of the will were specific so that the defeasance clause came into operation on the death of the son and the provision in the will could not be restricted to the case of the son dying before the testator or dying during minority *Bolo v Kolia* 11 Lah 657 28 A L J 1188 59 M L J 621 P C

P 317 S 124 n 8 Illustr (i) end Add In *Satyaranjan v Annapurna* 48 C L J 523 the distribution was to take place on the testator's death and the specific uncertainty even if not happening then the gift over was held inoperative

P 330 S 127 n 4 end Add A gift to daughter on condition that in case of her marriage before the death of the testator's son she will not take any interest under the will has been held to be a condition not in restraint of marriage and consequently not void *Cohen v Cohen* 54 C L J 324, *Re Laynon*, (1897) 2 Ch 264 distgd

P. 341 S 131, n 4, end Add Where a testator purported to dispose of his ancestral as well as self acquired immovable property by will and provided that in case any of his heirs claimed his share in the ancestral property, he should forfeit the self acquired property devised by the will, held, a case of election arose Such a condition cannot be held in *terrorem* merely (see illust ss), *Kishan Chand v Nirmajan*, 10 Lah 389

P. 352 S 133 n 2, end Add S 133 applies only to a case where the bequest is an absolute bequest either to a particular person or for the benefit of a particular person The section does not render conditions restraining alienation void where the bequest is limited to the life of a particular legatee *Kedar v Gaya*, 52 C L J 165, 129 I C 846

P 354 S 133 n 8 end Add Where an entire estate was conveyed to a person subject to the condition, viz. that a particular village was to form an exception to the conveyance, there was no repugnancy in the true sense of the term It meant a disposition of the entire estate with the exception of this particular village, *Fateh Chand v Rup Chand* 31 O W N 102

P 467. S 211 n 12 end Add (Newpara) The above view has been corroborated by a recent Privy Council decision which lays down in clear language that property vests in an executor in all cases on the death of the testator and the executor has power to dispose of the properties for the purpose of discharging debts due to the testator without having previously obtained probate of the will The wording of S 4 of the Probate and Administration Act is identical with that of S. 179 of the Succession Act and it has never been held that S 179 applies only to an executor who has proved the will With regard to the previous Privy Council rulings, it has been pointed out that this question was not under consideration in *Adm Genl v. Premlal*, 22 I A 107, 22 C 788 and isolated quotations from *Mirza Kurrutulain v Pearsa Sahib*, 32 I A 244, 33 C 116 cannot be regarded as suggesting that in the view of the Board the vesting under this section or the power of disposal under S 90 of the Probate and Administration Act (now S 307) is dependent upon the grant of probate S 211 makes no reference to probate, nor does the definition of 'executor' in S 2 (c) suggest that probate is any part of his title, *Kadiyala Venkatasubamma v Katreddi Ramayya*, 62 M L J 365 P C affirming 49 M 261 50 M L J 308

P 471 S 211 n 22, end Add Where letters of administration are granted in respect of the estate of a deceased Muhammadan the statutory vesting under the Act takes effect in substitution for the vesting in the heirs which exists between the death of the deceased and the grant of the letters, *Laxmidas v Ismail*, 28 Bom L R 1262, 99 I C 482

P. 479 S 219 f n. (i) Add *Shadagopa v Thirumalaswami*, 30 I C 27 M L T 129

P. 495. S. 218. f. n. (d). Add. *Kamla Prasad v. Murli*, 94 I. C. 750.

P. 506. S. 222. Para 1, end. Add. There is a presumption that a person dies intestate unless a will be established. *Ganshamdoss v. Narayandoss*, 53 M. L. J., 709, 106 I. C. 150.

P. 522. S. 227. n. 1, end. Add. To the same effect is the decision in the recent Privy Council case of *Kadiyala v. Katreddi*, 62 M. L. J. 365 P. C. There it is laid down that the provisions of this section do not imply that before probate the executor has no title but are only intended to simplify the proof of his title as dating from the testator's death. Before the grant, it is obvious, that in every case whether either the will itself, or anything done under it by the executor is challenged, proof of execution and capacity on the part of the testator, and of the appointment of the executor would be required. The object of the section is to get rid of this multiplication of proofs. Probate once granted authenticates the will against all the world; it affords a ready means of proof of the contents of the will (see Ss. 41 and 91 Evidence Act); and it is a complete answer by the executor of any challenge of his authority as such.

P. 531. S. 229. n. 1, end. Add. See the Administrator General's Act, III of 1913 Ss. 8 and 9.

P. 548. S. 241. n. 1, end. Add. The Administrator General is entitled to a full grant of administration under certain circumstances contemplated in this section on mere request.

P. 576. S. 258. n. 6, end. Add. The word 'may' is an enabling word but under certain circumstances may have a compulsory force, *Harnandan v. Baliram* 130 I. C. 785.

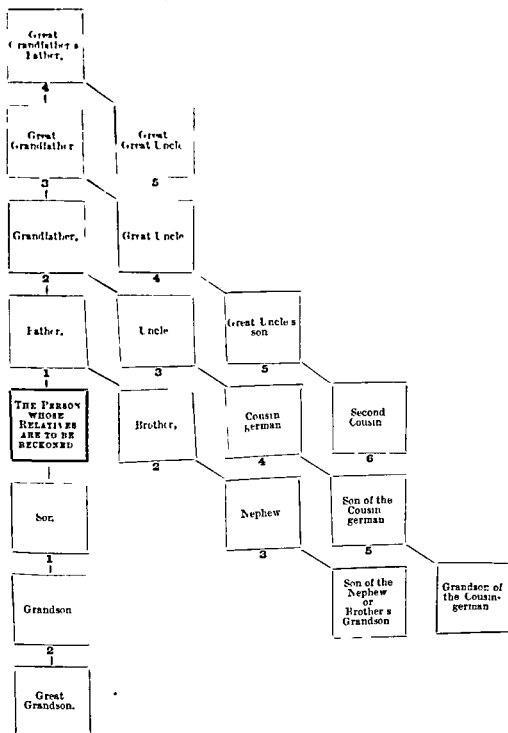
P. 582. S. 263. l. 1, after n. (a). Add. If any of the grounds mentioned in the section has been made out an order for revocation should be made, *Kalimuddin v. Hara Sundari*, 109 I. C. 243.

P. 591. S. 263. n. 16, end. Add. From a refusal to grant probate it by no means follows that in the opinion of the Court the will propounded is not the genuine will of the testator, particularly where the Court did not come to the conclusion whether the will was a forgery or not, *Ganesh v. Ram Chandra*, 21 B. 563.

SCHEDULE I.

(See Section 28.)

TABLE OF CONSANGUINITY.



SCHEDULE II.

PART I.

(See section 55.)

- (1) Brothers and sisters, and the children or lineal descendants of such of them as shall have predeceased the intestate.
- (2) Grandfather and grandmother.
- (3) Grandfather's sons and daughters, and the lineal descendants of such of them as have predeceased the intestate.
- (4) Great-grandfather and great-grandmother.
- (5) Great-grandfather's sons and daughters and the lineal descendants of such of them as have predeceased the intestate.

PART II.

(See section 56.)

- (1) Father and mother.
- (2) Brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.
- (3) Paternal grandfather and paternal grandmother.
- (4) Children of the paternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.
- (5) Paternal grandfather's father and mother.
- (6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.
- (7) Brothers and sisters by the mother's side and the lineal descendants of such of them as have predeceased the intestate.
- (8) Maternal grandfather and maternal grandmother.
- (9) Children of the maternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.
- (10) Son's widow, if she has not re-married at or before the death of the intestate.
- (11) Brother's widow, if she has not re-married at or before the death of the intestate.
- (12) Paternal grandfather's son's widow, if she has not re-married at or before the death of the intestate.
- (13) Maternal grandfather's son's widow, if she has not re-married at or before the death of the intestate.
- (14) Widowers of the intestate's deceased daughters if they have not re-married at or before the death of the intestate.
- (15) Maternal grandfather's father and mother.
- (16) Children of the maternal grandfather's father, and the lineal descendants of such of them as have predeceased the intestate.

(17) Paternal grandmother's father and mother.

(18) Children of the paternal grandmother's father, and the lineal descendants of such of them as have predeceased the intestate.

SCHEDULE III

(See section 67.)

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57.

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, and 190

Restrictions and modifications in application of foregoing sections.

1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will

2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870

3. Nothing therein contained shall affect any law of adoption or intestate succession

4. In applying section 70 the words 'than by marriage or' shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words 'son,' 'sons,' 'child,' and 'children' shall be deemed to include an adopted child, and the word 'grand-children' shall be deemed to include the children, whether adopted or natural born, of a child whether adopted or natural-born, and the expression 'daughter-in-law' shall be deemed to include the wife of an adopted son

SCHEDULE IV.

[See section 274 (2)]

FORM OF CERTIFICATE.

I, A. B., Registrar (or as the case may be) of the High Court of Judicature at _____ (or as the case may be) hereby certify that on the _____ day of _____, the High Court of Judicature at _____

(or as the case may be) granted probate of the will (or letters of administration of the estate) of C D, late of deceased, to E F of and G H of and that such probate (or letters) has (or have) effect over all the property of the deceased throughout the whole of British India

SCHEDULE V.

[See section 284 (4)]

FORM OF CAVEAT

Let nothing be done in the matter of the estate of A B, late of , deceased, who died on the day of at , without notice to C D of

SCHEDULE VI

(See section 289)

FORM OF PROBATE

I, , Judge of the District of [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known that on the day of in the year , the last will of late of , a copy whereof is hereunto annexed, was proved and registered before me and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to , the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint

SCHEDULE VII

(See section 290)

FORM OF LETTERS OF ADMINISTRATION

I, , Judge of the District of [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known that on the day of letters of administration (with or without the will annexed, as the case may be), of the property and credits of , late of , deceased, were granted to , the father (or as the case may be) of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of

the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VIII.

(See section 377.)

FORM OF CERTIFICATE AND EXTENDED CERTIFICATE.

In the Court of

To *A. B.*

Whereas you applied on the day of for a certificate under Part X of the Indian Succession Act, 1925, in respect of the following debts and securities, namely :—

Debts.

Serial number	Name Number of Debtor	Amount of debt, including interest, on date of application for certificate	Description and date of instrument, if any, by which the debt is secured

Securities.

Serial number	DESCRIPTION			Market-value of security on date of application for certificate
	Distinguishing number or letter of security	Name, title or class of security	Amount or par value of security	

This certificate is accordingly granted to you and empowers you to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this day of

District J,

(or as the case may be) granted probate of the will (or letters of administration of the estate) of C D, late of _____, deceased, to E F. of _____ and G H. of _____, and that such probate (or letters) has (or have) effect over all the property of the deceased throughout the whole of British India

SCHEDULE V.

[See section 284 (4)]

FORM OF CAVEAT

Let nothing be done in the matter of the estate of A B, late of _____, deceased, who died on the _____ day of _____ at _____, without notice to C D of _____

SCHEDULE VI

(See section 289)

FORM OF PROBATE

I, _____, Judge of the District of _____ [or Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)], hereby make known that on the _____ day of _____ in the year _____, the last will of _____ late of _____, a copy whereof is hereunto annexed, was proved and registered before me and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to _____, the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint

SCHEDULE VII

(See section 290)

FORM OF LETTERS OF ADMINISTRATION

I, _____, Judge of the District of _____ [or Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)], hereby make known that on the _____ day of _____ letters of administration (with or without the will annexed, as the case may be), of the property and credits of _____, late of _____, deceased, were granted to _____, the father (or as the case may be) of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of

the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VIII.

(See section 377.)

FORM OF CERTIFICATE AND EXTENDED CERTIFICATE.

In the Court of

To *A. B.*

Whereas you applied on the day of for a certificate under Part X of the Indian Succession Act, 1925, in respect of the following debts and securities, namely :—

Debts.

Serial number	Serial Number of Debtor	Amount of debt, including interest, on date of application for certificate	Description and date of instrument, if any, by which the debt is secured

Securities.

Serial number	DESCRIPTION			Market-value of security on date of application for certificate
	Distinguishing number or letter of security	Name, title or class of security	Amount or par value of security	

This certificate is accordingly granted to you and empowers you to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this day of

District Jud

(or as the case may be) granted probate of the will (or letters of administration of the estate) of C D, late of _____, deceased, to E F of _____ and G H of _____, and that such probate (or letters) has (or have) effect over all the property of the deceased throughout the whole of British India

SCHEDULE V.

[See section 284 (4)]

FORM OF CAVEAT

Let nothing be done in the matter of the estate of A B, late of _____, deceased, who died on the _____ day of _____ at _____, without notice to C D of _____

SCHEDULE VI

(See section 289)

FORM OF PROBATE

I, _____, Judge of the District of _____ [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known that on the _____ day of _____ in the year _____, the last will of _____, late of _____, a copy whereof is hereunto annexed, was proved and registered before me and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to _____, the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint

SCHEDULE VII

(See section 290)

FORM OF LETTERS OF ADMINISTRATION

I, _____, Judge of the District of _____ [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known that on the _____ day of _____ letters of administration (with or without the will annexed, as the case may be), of the property and credits of _____, late of _____, deceased, were granted to _____, the father (or as the case may be) of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of

the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VIII.

(See section 377.)

FORM OF CERTIFICATE AND EXTENDED CERTIFICATE.

In the Court of

To A. B.

Whereas you applied on the day of for a certificate under Part X of the Indian Succession Act, 1925, in respect of the following debts and securities, namely :—

Debts.

Serial number	Number of Debtor	Amount of debt, including interest, on date of application for certificate	Description and date of instrument, if any, by which the debt is secured

Securities.

Serial number	DESCRIPTION			Market-value of security on date of application for certificate
	Distinguishing number or letter of security	Name, title or class of security	Amount or par value of security	

This certificate is accordingly granted to you and empowers you to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this day of

District Judge

In the Court of

On the application of *A. B.* made to me on the day of
 , I hereby extend this certificate to the following debts and
 securities, namely:—

Debts.

Serial number	Name of debtor	Amount of debt, including interest, on date of application for extension	Description and date of instrument, if any, by which the debt is secured

Securities.

Serial number	DESCRIPTION			Market-value of security on date of application for extension
	Distin- guishing number or letter of security	Name, title or class of security	Amount or par value of security	

This extension empowers *A. B.* to collect those debts [and]
 [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those
 securities].

Dated this day of

District Judge

SCHEDULE IX. (Repealed)

This Schedule along with S 392 has been repealed by Act XII of 1927, S 2 and Schedule The Schedule ran as follows:—

(See section 392.)

ENACTMENTS REPEALED.

Number and Year	Short title	Extent of repeal
XIX of 1841	The Succession (Property Protection) Act 1841	So much as has not already been repealed
X of 1865	The Indian Succession Act, 1865	So much as has not already been repealed
XXI of 1865	The Parsi Intestate Succession Act, 1865	The whole Act
XXI of 1870	The Hindu Wills Act 1870	So much as has not already been repealed
III of 1874	The Married Woman's Property Act, 1874	The last paragraph of section 2
V of 1881	The Probate and Administration Act, 1881	So much as has not already been repealed
VI of 1881	The District Delegates Act, 1881	The whole Act
VI of 1889	The Probate and Administration Act, 1889	So much as has not already been repealed
VII of 1889	The Succession Certificate Act, 1889	So much as is unrepealed, except section 13
II of 1890	The Probate and Administration Act, 1890	So much as has not already been repealed
VII of 1901	The Native Christian Administration of Estates Act, 1901	So much as has not already been repealed
VIII of 1903	The Probate and Administration Act, 1903	So much as has not already been repealed
XVIII of 1919	The Repealing and Amending Act, 1919	So much of Schedule I as refers to Act X of 1865 or to Act V of 1891
XXXVIII of 1920	The Devolution Act, 1920	So much of Schedule I as refers to Act X of 1865 or to Act of 1891

APPENDIX.

FORMS & PRECEDENTS.

I. A WILL CONTAINING THE USUAL REQUESTS.

I, A. B. (*testator*) of do hereby revoke all other wills and codicils and testamentary dispositions at any time heretofore made by me and declare this to be my last will and testament [the form in common use in England runs as follows :— This is the last will of me A. B. of by occupation . I revoke all other wills and testamentary dispositions by me heretofore made].

1. I appoint my son C. D. of and my friend E. F. of to be executors (or executors and trustees) of this my last will and testament.

2. I give and bequeath my house and premises No to my wife G. H. for life and after her death to my son I. J. absolutely.

in which I now reside with together with the furniture and ame at the time of my death to wer of alienation over the same.

4. I give and bequeath the sum of Rs. 5000/- to each of my daughters K. L. and M. N. absolutely.

a now carried and effects which moneys and debts of the said business ng in respect of the said business at the time of my death.

6. I give and bequeath to my younger brother Q. R. the sum of Rs 2000/- if he shall attain the age of 18 years to be paid to him within a year of his attaining that age or should he attain it during my lifetime within six calendar months after my death.

7. I give and bequeath the sum of Rs. 500/- to my deceased elder brother's son S. T. of , or if he should die in my lifetime, leaving issue surviving me, then, to his executors or administrators, to be disposed of by them as part of his general estate.

8. I give and bequeath to each of my domestic servants who shall be in my employment at the time of my death the sum of Rs. 100/- each (or a sum equal to one year's wages in addition to any sums which may be owing by me to the said servant).

9. I give and bequeath the sum of Rs. 10,000/- to Hospital for the endowment of a bed therein to be named (or for the general purposes of the said Hospital) and I declare that the receipt of the Superintendent thereof shall be a good discharge for such payment.

which he owes me or so and arrears of interest f duty and I direct my r which the said sum of V. shall die in my life- or administrators of the shall cancel and deliver J. 15 Ed. p. 366). or I him in addition to the amount the said beques of any

11 I give and bequeath all properties whatsoever which I shall be entitled at my death and not otherwise disposed of (or the rest and residue of my estate) to my son I J In witness whereof I have to this my last will set my hand this day of
Sd A. B

Signed by A. B as and for his last Will and testament in the presence of us who in his presence and at his request and in the presence of each other hereunto subscribe our names as witnesses

Sd W X

Y Z

2 A SIMPLE WILL

I A B (testator) of do hereby revoke all other wills and testamentary dispositions at any time heretofore made by me and declare this to be my last will and testament I bequeath all my movable and immovable properties and effects (whatsoever and wheresoever) unto C D I appoint E F the sole executor of this my Will In witness &c

Attestation clause and signatures of witnesses
as in Form No 1

Testator's signature

3 A WILL PARTITIONING PROPERTIES AMONG THE LEGATEES

I, A B (son of C D) of do hereby revoke the will made and executed by me on and registered in Calcutta Registry Office in Book No Vol 2 pages being No for and all other wills and codicils and testamentary dispositions or writings at any time heretofore made by me and declare this to be my last will and testament I appoint my friend and neighbour of son of deceased sole executor of this my last will and I direct my executor to spend one of the Government Securities for Rs 500 in the performance of my said

I am possessed of two houses Nos and two Calcutta Municipal Debentures of the 4% Loan of 1900/02 bearing Nos of the face value of Rs 1000/- each and three Government Securities of 3½ % Loan of 1842/43 bearing No for Rs 1000 and two bearing Nos for Rs 500 and household articles and things

I had a shop for sale of jewellery and stores at I had given the said shop to my eldest and second sons who have been carrying on the same and are responsible for the debts and liabilities thereof My youngest son has no interest in the said shop and he is not liable for the debts thereof

I give and bequeath to my wife the said Government Security of the face value of Rs 1000 and the said two Municipal debentures for Rs 1,000 each during her natural life and after her death I give the same to my said three sons absolutely in equal shares My wife shall have the right of residence during her natural life as hereinafter mentioned I further will and direct that in addition to the interest of the said Government Security and Municipal Debentures given to my wife as aforesaid my sons and shall pay her Rs 5 per month for her maintenance during her natural life and I declare that I have fixed the said sum as proper maintenance for my said wife having regard to my estate and my position in life.

I give and bequeath the remaining Government Security for Rs 500 to my daughters and in equal shares absolutely

I have divided my two houses and premises No and in plots marked respectively A, B and C on the map or plan hereto annexed

I give my youngest son absolutely the portion of my said pr marked as lot 'A' and coloured pink on the said map or plan, the such portion being and consisting altogether of 9 rooms in and upper stories subject to the right of my said wife to reside in portion during her lifetime

I give and devise the portion of my said premises marked as lot B and coloured yellow on the said map or plan the area of such portion being and consisting altogether of 8 rooms in the lower and upper stories to the sons of my eldest son living at the time of my death absolutely

I give and devise the portion of my said premises marked as lot C and coloured blue on the said map or plan the area of such portion being and consisting altogether of 7 rooms in the lower and upper stories to the sons of my second son living at the time of my death absolutely

I further will and direct that until the said 3 portions of my said premises so given and devised as aforesaid are separately numbered and assessed the devisees will pay the rates and taxes of the said premises in equal shares but after such portions are separately numbered and assessed by the Municipality each devisee or devisees will pay the assessment of his or their portions

I give devise and bequeath the rest and residue of my estate whatsoever and wheresoever situate to my said three sons in equal shares *In witness &c*

Signed, sealed and acknowledged
by A B as and for (the rest as in
Form I)

Testator's Signature

Witnesses' Signatures

4 A CODICIL

I A B of hereby declare this to be a codicil (or a second codicil) to my will which bears date I hereby revoke the appointment of C D and E F as executors and trustees of my said will and in lieu thereof I appoint G H of and I J of to be the executors and trustees of my said will and I declare that my said will shall be read and shall take effect as if the names of the said G H and I J respectively were written in every part of the said will wherein the names of C D and E F occur in lieu of such last mentioned names and as if such last mentioned names had been struck out from every part of the said will *In witness, &c*

Attestation Clause

Testator's Signature

Witnesses' Signatures
(See Form No 1)

5 REVOCATION OF WILL

I A B of do hereby revoke my will of the day of
Attestation Clause *Testator's Signature*
Witnesses' Signature
(See Form No 1)

6 REVIVAL OF WILL BY A MEMORANDUM

Whereas I A B of have revoked my last will and testament executed by me on day of I hereby annul such revocation and revive and confirm the said will

Attestation Clause

Testator's Signature

Signature of Witnesses
(As in Form No 1)

7 REVIVAL OF WILL BY A CODICIL

I A B declare this to be a codicil to my will bearing date Where
as (as in Form No 6)
Attestation Clause *Testator's Signature*

Witnesses' Signatures
(As in Form No 1)

8 MEMORANDUM OF ALTERATIONS INTERLINEATIONS AND RE-EXECUTION (H & J 13 ED 40^a, B 1915 FD 674)

I A B have made in my own handwriting (or have caused to be made) in this will the alterations hereinafter specified that is to say in the line from top of the page the words are erased and the

words " " are inserted in their stead. The words " " in the line from the bottom of the page and the and lines from the bottom of the same page are erased. Between the words " and " in the line from top of the page the words " are inserted. I declare the above writing so altered to be my will.

Attestation Clause.

Testator's Signature.

Witnesses' Signatures.

(See Form No. 1).

9 MARGINAL ALTERATIONS.

For the words " " through which I have drawn my pen (or which I have caused to be erased) it is my will that the words " " be substituted and inserted.

Attestation Clause.

Testator's Signature.

Witnesses' Signatures.

(As in Form No. 1)

10 PETITION FOR PROBATE

(IN THE HIGH COURT &c)

TESTAMENTARY & INTESTATE JURISDICTION.

IN THE GOODS OF A B. LATE OF

Landholder, deceased.

TO THE HONOURABLE SIR . . .

The Humble Petition of C D of In the town of Calcutta, the eldest son of the deceased and the sole executor of his last will and testament.

Sheweth —

1. That the deceased abovenamed who was in his lifetime and at the time of his death a Hindu inhabitant of Calcutta governed by the Bengal School of Hindu law died at the premises No in the town of Calcutta on the day of after having duly made his last will and testament in the Bengali language and character on the day of whereby he appointed your petitioner as the sole executor thereof.

2. That the said last will and testament of the deceased abovenamed together with an English translation thereof by one of the sworn interpreters of this Honourable Court is herunto annexed and marked with the letter 'A'

3. That the said last will and testament was duly executed by the deceased abovenamed as is proved by the declaration of G. H. one of the attesting witnesses thereto.

4. That the amount of assets which are likely to come to your petitioner's hands is of the value of Rs as will appear from your petitioners affidavit in these goods solemnly affirmed on the day of and your petitioner has paid the ad valorem duty payable in respect thereof as will appear from the certificate hereunto annexed and marked with the letter "B."

5. That your petitioner applies for probate of the said last will and testament of the deceased abovenamed as the sole executor named therein.

6. That no intimation has been received by this Honourable High Court from any District Court of any grant of Probate or Letters of Administration of the property and credits of the deceased abovenamed with effect throughout the whole of British India as will appear from the certificate hereunto annexed and marked with the letter "C."

Your petitioner therefore humbly prays your Lordships for an order that Probate of the said last will and testament of the deceased a named be granted to your petitioner as executor named therein and your petitioner in duty bound shall ever pray.

I, C D the abovenamed petitioner do declare that what is stated in the foregoing petition is true to the best of my information and belief

The undersigned one of the attesting witnesses to the last will and testament of the deceased abovenamed do hereby declare that I was present at the time the testator abovenamed signed his will and the signature A B at the foot of the said will is in the proper handwriting of the said deceased and was affixed in my presence and in the presence of the other attesting witness both of us signing in the presence of the deceased

11 PETITION BY ONE EXECUTOR THE OTHER RENOUNCING FOR PROBATE
HAVING EFFECT THROUGHOUT BRITISH INDIA

(IN THE HIGH COURT &c)

TESTAMENTARY INTESTATE JURISDICTION

IN THE GOODS OF A B &c

(as in Form No 10)

TO THE HONOURABLE SIR &c

THE HUMBLE PETITION OF C D

(as in Form No 10)

SHEWETH

1 That A B the deceased abovenamed who was in his lifetime and at the time of his death a Hindu governed by the Bengal School of Hindu law died at on the having duly executed his last will and testament in the Bengall language and character bearing date the whereby he appointed K L and your petitioner executors

2 as in para 2, Form No 10

3 as in para 3 Form No 10

4 as in para 4 Form No 10

5 as in para 5, Form No 10

6 That as will appear from the affidavit of valuation referred to in para graph 4 above there are assets appertaining to the estate of the said deceased situated outside the Presidency of Bengal and your petitioner accordingly desires to have a grant throughout the whole of British India and he thereby undertakes in case of its being afterwards found that there are other property and effects he will pay the court fee payable in respect thereof

7 as in para 6 Form No 10

8 That the said executor K L has renounced his right to apply for probate of the said will as will appear from his signature at the foot of the declaration hereunder

Your petitioner humbly prays your lordships for an order that probate of the last will and testament of the deceased abovenamed may be granted to your petitioner and your petitioner also prays that such grant may extend throughout the whole of British India your petitioner hereby undertaking in case of its being afterwards found that there are other property and effects that he will pay the court fee payable in respect thereof and your petitioner as in duty bound shall ever pray

VERIFICATION

[as in Form No 10]

Add I the undersigned executor nominated by the last will and testament dated the of A B the deceased abovenamed do hereby declare that I have not in any way intermeddled in the estate of the deceased abovenamed and will not hereafter do so and I hereby renounce all my right title and claim and demand to the probate and execution of the said will

SD K. L

12 PETITION FOR LETTERS OF ADMINISTRATION FOR ESTATES BELOW RS 2000
HAVING EFFECT THROUGHOUT BRITISH INDIA

Estate under Rs 2000
(IN THE HIGH COURT &c)

TESTAMENTARY AND INTESTATE JURISDICTION

IN THE GOODS OF A B LATE A CLERK
IN AND LATELY RESIDING
AT IN THE TOWN OF
CALCUTTA, DECEASED

TO THE HON BLE SIR &C

The humble petition of C D residing at
in the town of Calcutta Hindu inhabitant, the father of the deceased abovenamed

SHEWETH,—

1 That the deceased abovenamed who was in his lifetime and at the time of his death a Hindu inhabitant of Calcutta governed by the Bengal School of Hindu Law died at in Calcutta on the day of

2 That the said deceased did not leave any son grandson great grandson widow daughter or daughter's son but he died unmarried and left him surviving your petitioner his father as his sole heir

jurisdiction of this Honourable
alone of less than Rs 1200/ as
these goods solemnly affirmed

4 That no ad valorem duty is payable in respect of the estate of the deceased abovenamed as will appear from the certificate of the Taxing Officer of this Hon ble Court which is hereto annexed and marked with the letter A

5 That your petitioner has made diligent search and enquiry to ascertain whether the said deceased left any will or other testamentary document but has not found any and your petitioner verily believes that he died intestate

6 That it is necessary for your petitioner to obtain Letters of Administration to the estate and effects of the deceased abovenamed with effect throughout British India as some of his assets are to be realised in Bombay

7 That your petitioner applies for Letters of Administration of the estate and effects of the deceased abovenamed as his father and sole heir

8 That no intimation has been received by this Hon ble Court from any other High Court or any District Court of any grant of Probate of any will or Letters of Administration of the property or credits of the deceased abovenamed with effect throughout the whole of British India as will appear from the certificate hereto annexed and marked with the letter B

9 That your petitioner undertakes to pay to the Secretary of State in Council or other party entitled thereto the fees of Court in case the estate shall hereafter be found to be of greater gross value than Rs 2000

Your petitioner therefore humbly prays your Lordships for an order that Letters of Administration of the property and credits of the deceased abovenamed be granted to your petitioner on his executing the usual administration bond with a surety or sureties to be approved by the Registrar of this Honourable Court and your petitioner prays that such grant may have effect throughout British India. And your petitioner as in duty bound shall ever pray

VERIFICATION

[as in Form 10]

13 PETITION FOR LETTERS OF ADMINISTRATION

(IN THE HIGH COURT ETC)

TESTAMENTARY AND INTESTATE JURISDICTION

IN THE GOODS OF A B LATE ETC
(as in Form No 12)

TO THE HONOURABLE SIR

THE HUMBLE PETITION OF C D & C
(as in Form No 12)

SHEWETH

1 As in Form No 12 para 1

2 As in Form No 12 para 2

3 As in Form No 10 para 4

4th to 7th as in Form No 12 paras 5 8

Your petitioner therefore humbly prays your etc
as in prayer in Form No 12 leaving out the
prayer for having effect throughout British India14 PETITION FOR ADMINISTRATION DE BONIS NON WITH COPY OF WILL ANNEXED
(IN THE HIGH COURT &c)

TESTAMENTARY AND INTESTATE JURISDICTION

IN THE GOODS OF A B LATE &c
(as in Form No 12)

TO THE HONOURABLE SIR

The humble petition of C D and E F both
residing at in the town of Calcutta Hindu
inhabitants and the grandsons of the deceased
abovenamed

RESPECTFULLY SHEWETH

1 That A B the deceased abovenamed who was in his lifetime and at the time of his death a Hindu inhabitant of Calcutta governed by the Bengal School of Hindu law and a in the service of the Government of India died at on the day of leaving property and effects within the jurisdiction of this Honourable Court and after having made his last will and testament in writing whereby he appointed his wife your petitioner's grandmother Sm the sole executrix thereof

2 That on the day of the said Sm proved the said last will and testament of the deceased abovenamed and obtained probate thereof out of and under the seal of this Honourable Court

3 That the said Sm died on or about the day of leaving her two sons E F and J H both since deceased as the heirs of the deceased abovenamed

4 That on the day of letters of administration de bonis non of the property and credits of the said A B (with a copy of the said will annexed) were granted by this Honourable Court to the said E F and J H

5 That the said J H died intestate on or about the day of leaving his widow his heiress and he left no son or grandson

6 That your petitioner's father the said E F died intestate on or about the day of leaving him surviving his two sons your petitioners as his heirs

7 That your petitioners are the present heirs of the deceased abovenamed as his grandsons and there is no other son or grandson of the deceased abovenamed

8 That it is necessary to obtain letters of administration de bonis non in

the name of the said J H as the last will and testament of the said A B is not proved

9 That your petitioners have set forth in their affidavit on the day of the particulars of the property of the abovenamed which have come or are likely to come

herein
of the

hands on the death of your petitioners father the said E F and no ad valorem fee in respect thereof is payable by your petitioners as will appear from the certificate of the Taxing Officer of this Honourable Court which is nereunto annexed and marked with the letter "A"

10 That no intimation has been received by this Honourable Court from any other High Court or District Court of any grant of probate or letters of administration of the property and credits of the deceased abovenamed with effect throughout the whole of British India as will appear from the Registrar's certificate hereunto annexed and marked with the letter B

11 That your petitioners are desirous of obtaining letters of administration de bonis non of the estate and effects of the deceased abovenamed with a copy of the last will and testament annexed as his grandsons and heirs

Your petitioners therefore humbly pray your Lordships for an order that letters of administration de bonis non of the property and credits of the deceased abovenamed with a copy of his said last will and testament annexed be granted to your petitioners on their executing the usual administration bond with a surety or sureties to be approved by the Registrar of this Honourable Court

And your petitioners as in duty bound shall ever pray

15 PETITION FOR REVOCATION OF PROBATE

(IN THE HIGH COURT &c)

In the goods of A B late of thana Sub Registry
in the District of and of in the town of

TO THE

The humble petition of C D and E F both of
in the town of two of the brothers of
the deceased abovenamed most respectfully

SHEWETH

1 That your petitioners are the two elder uterine brothers and reversionary heirs of the deceased abovenamed who died intestate at aforesaid on the at p m leaving his widow G H him surviving

2 That the deceased abovenamed suffered for about a month before his death from pneumonia jaundice dropsy and various other diseases

3 That for most part of the year the deceased used to reside at and your petitioners at the native place at aforesaid In his lifetime the deceased along with some of his nephews and grand nephews used to look after and manage the joint family business of carried on in under the name and style of while the joint family business at aforesaid which was and still is carried on under the name and style of was managed by your petitioners along with other members of the family

4 That sometime in your petitioners along with other members of the family came to Since then your petitioners stayed in and attended the deceased during the illness of which he suffered for about a month before his death.

5 That for the last 4 or 5 days before his death the condition of the deceased was getting worse day by day and Dr had to be consulted

6 On the evening of the when the condition of the deceased was serious Babu pleader called and asked the deceased if he wanted to execute a will for the disposition of his properties but the deceased did not say anything at first, but on being pressed hard repeatedly by G H the widow of the deceased abovenamed by I J the Superintendent of the Institution and by K L one of the inmates of the said Institution the deceased said that he should not be teased in that way and that he would not execute a will. From the hours of the next day, i.e. the deceased lost all consciousness and not give any response to anybody

7 That during the whole of the (date) the deceased was lying in a drowsy and unconscious state, unable either to speak or make any sign as to his requirements or to take any medicine or liquid food /

8 That at pm on the the doctor after examining the deceased informed your petitioners that there was no hope of his life

9 That at p m on the Babu pleader came to the room of the deceased when your petitioners and other members of the family were sitting nearby and asked the deceased if he wanted to make a will but the deceased could not and did not give any response although pressed as before by the said G H, I J and K L Thereupon the said K L took the said lawyer to the adjoining room and they returned after a few minutes with some pencil writing on a piece of paper and a thumb impression of the deceased was taken by the lawyer's clerk on the said piece of paper Thereafter the said Babu lawyer retired to the adjoining room and asked your petitioner C D to accompany him Some of the other persons who were present in the room of the deceased accompanied the said Babu lawyer to the adjoining room

10 That thereafter the said Babu lawyer told your petitioner C D that the pencil writing contained notes for a settlement of their affairs which was to be prepared and they should all sign thereunder

11 That at or about pm on the same day the said Babu lawyer called again with some papers but nothing could be done in the matter as the doctors had left a little before giving up the hope of life of the deceased

12. That on receipt of a notice on or about the from the asking for valuation of the 1/4th share of the deceased in the joint family property and business at your petitioners came to know that a will of the deceased had been propounded. Your petitioners immediately instructed their legal adviser to find out what has been done in the matter

13 That your petitioners were informed by their legal adviser that the widows of the deceased had applied to Court on for probate of the said pencil writing alleging it to be the last will of the deceased and in the petition for probate they stated that the deceased had died on and that probate was issued to them on Your petitioners believe and charge that the date of the death of the said deceased was wrongfully mentioned as for the purpose of removing the suspicion of the Court

14 It is untrue that the deceased had at any time or before anybody declared that in the event of his dying before executing an engrossed will the said pencil writing should be treated as his last will and testament On the the said deceased was not in a position to understand the nature and contents of any will writing for any will to Babu lawyer will writing was never executed or attested in Bengali and in English

15 That your petitioners are informed that the said widows have shewn in the affidavit of assets filed in the above goods that the said joint family business belonged to the deceased alone and they omitted to include the share of the deceased in the joint family business and residence at and undervalued the stock in trade and assets They believe and charge that such inclusion and omission as aforesaid were made wilfully to get probate without any delay or knowledge of your petitioners

16 That your petitioners are informed that the said widows have shewn in the affidavit of assets filed in the above goods that the said joint family business belonged to the deceased alone and they omitted to include the share of the deceased in the joint family business and residence at and undervalued the stock in trade and assets They believe and charge that such inclusion and omission as aforesaid were made wilfully to get probate without any delay or knowledge of your petitioners

17 Under the circumstances your petitioners desire that the said probate of the alleged pencil writing should be revoked and necessary reliefs given to your petitioners as may be deemed expedient in the matter

Your petitioners therefore humbly pray for an order that the probate issued to the said Q R and K I by this Honourable High Court

16 AFFIDAVIT IN OPPOSITION TO ABOVE.

10 With reference to paragraph 12 I say that the allegations contained there are all false as C, D and E, F. are themselves attesting witnesses to the said containing instructions and were present throughout.

11 With reference to paragraph 13 I say that it is false to state that the date of the death of the deceased was wrongfully put down as

12 With reference to paragraph 14 I say that the statements contained therein are false As stated therein before the said instructions for a will was given to Babu lawyer when the testator was perfectly in his senses and capable fully of understanding the nature and effect of his acts I say that the paper containing instructions was duly executed and attested I say that the deceased did not sign his name on the said note as for some years he had tremor of his hand and could not sign or write properly

13 With reference to paragraph 15 I say that the business of and the dwelling house at was never the joint family business and property as alleged therein The petitioners have or had no right title or interest therein The charges made therein are base and frivolous and I say that the petitioners had knowledge of the grant of the said probate as they approached different members of my caste to have proper provisions made for their maintenance and upkeep

14 With reference to paragraph 16 I say that the petitioners have no claim whatsoever to the estate of the deceased I deny that I am under the clutches of persons of the Institution

15 With reference to paragraph 17 I say that no grounds have been made out for revocation of the probate

16 I say that the deceased had testamentary capacity and fully understood

was labouring under no delusions and was in the full possession of his senses and had intellect to understand the nature of the instructions he gave for the preparation of his will

17 AFFIDAVIT OF ASSETS

(IN THE HIGH COURT &c)

TESTAMENTARY & INTESTATE JURISDICTION

IN THE GOODS OF A B LATF OF
AND

IN THE MATTER OF &c
(See Form No 1)

I Sm C D residing at in the town of the sole executrix of the last will and testament (or the next of kin) of the deceased abovenamed solemnly affirm and say as follows --

1 That I am the widow and sole executrix of the last will and testament (or the next of kin) of the deceased abovenamed and the applicant for probate of the said will

2 That I have truly set forth in Annexure A to this affidavit all the property and credits which the abovenamed deceased did possessed of or was entitled to at the time of his death and which have come or are likely to come to my hands

3 That I have also truly set forth in Annexure B all items I am by law allowed to deduct

4 That the said assets exclusive only of such last mentioned items but inclusive of all rents interest dividends and increased values since the date of the death of the said deceased are under the value of Rs

ANNEXURE A.

VALUATION OF THE MOVABLE AND IMMOVABLE

PROPERTY OF A B DECEASED

	Rs As P
Cash in the house and at the Banks household goods wearing apparel books plate jewel etc	

Cash in the house	
In the Bank	Nil
Household goods	
Property in Government Securities transferable at the Public Debt Office	

Immovable Property consisting of —

- (1) In the District of—
 - (a) Char No yielding a net annual income of
Rs and valued at
 - (b) Kole Jote No yielding a net annual income
of Rs and valued at
 - (c) Kayem Karsha Jama Mfalo in the name of
 yielding a net annual income of Rs and
valued at
 - (d) Undivided half share in Nim Howla having
no income and valued at
 - (e) Mourasi Mokorari land in the village of
in having no income and valued at

- (2) In the District of—
 - (a) Mourasi Mokorari garden land at village
having no income and valued at
 - (b) Dwelling house with land and tank attached
thereto at village having no income and
valued at

Leasehold Property	Nil
--------------------	-----

Property in Public Companies	Nil
------------------------------	-----

<i>Policy of Insurance upon life, money out on mortgage and other securities, such as bonds, mortgages, bills, notes and other securities for money</i>	Nil
---	-----

Book Debts	Nil
------------	-----

Stock in trade	Nil
----------------	-----

Other Property, not comprised under the foregoing heads	<u>Nil</u>
---	------------

Deduct amount shewn in Annexure B—not subject to duty	<u> </u>
---	-----------------------------

TOTAL

ANNEXURE B

Amount of debts due and owing from the deceased and payable by law out of the estate	Nil
--	-----

Amount of funeral expenses	
----------------------------	--

Amount of mortgage incumbrances	Nil
---------------------------------	-----

Property held in trust not beneficially or with general power to confer a beneficial interest	Nil
---	-----

Other property not subject to duty	<u>Nil</u>
------------------------------------	------------

Solemnly affirmed by Sm }
 at the Calcutta Court }
 House this day of . }

Before me

Commissioner

18 PETITION FOR SUCCESSION CERTIFICATE
 IN THE HIGH COURT &c
 TESTAMENTARY & INTESTATE JURISDICTION
 IN THE GOODS OF A B LATE OF
 AND

IN THE MATTER OF AN APPLICATION
 UNDER PART X OF
 ACT XXXIX OF 1925 AS AMENDED BY ACT XVIII OF 1929

TO THE HON BLE

CHIEF JUSTICE &c

THE HUMBLE PETITION OF C D

MOST RESPECTFULLY Sheweth

1 That A B the deceased abovenamed who was in his lifetime and at the time of his death a British subject governed by the Bengal School of Hindu law died at on

2 That the ordinary residence of the said deceased during his lifetime and at the time of his death was at within the jurisdiction of this Hon ble Court

or

That the deceased had no fixed place of residence but left assets within the jurisdiction of this Hon ble Court

3 That the deceased abovenamed died as aforesaid leaving the following heirs under the Bengal School of Hindu law by which he was governed and the following near relations

C D your petitioner

E F

G H a minor of about 15 years
 his three sons and heirs

Sm I J

Sm K L, a minor of the age of about 10 years
 his two unmarried daughters

M N his sole widow

[That all the abovenamed heirs and relations of the said deceased reside at the said premises]

4 That the deceased left some moneys in the Savings Bank of the Imperial Bank of India which is payable in Calcutta within the jurisdiction of this Hon'ble Court

5 That your petitioner as the eldest son and one of the heirs of the above named deceased is entitled to a certificate under Part V of the said Act. The said E F, the adult son of the mother and natural guardian of G H the objection to the grant of such a certificate consent signed at the foot hereof

6 That to the best of your petitioner's knowledge and information no letters of administration or succession certificate has yet been granted in respect of the estate and effects of the deceased or any part thereof, and no intimation has yet been received by this Hon'ble Court of any grant of probate of any will of the deceased or letters of administration to the estate credit and effects of the deceased by any other High Court or District Court throughout the whole of British India as will appear from the Registrar's certificate hereto annexed and marked with the letter "A"

7 That there is no impediment under S 370 or under any other provisions of the Indian Succession Act or any other enactment to the grant of the certificate or to the validity thereof if it were granted.

8 That the particulars of the credits and debts in respect of which certificate is applied for by your petitioner are set forth in the Schedule annexed and marked "B"

9 That your petitioner has paid the necessary ad valorem duty as will appear from the Registrar's Certificate hereto annexed, and marked with the letter 'C'

Your petitioner therefore prays that a succession certificate may be granted to him empowering him to collect and realise the debts mentioned in Annexure 'B' hereto,

And your petitioner as in duty bound shall ever pray
Sd/ C D

VERIFICATION

ANNEXURE B referred to in Form 18 above.

Serial No	NAME OF DEBTORS	Amount of debt including interest on the date of application for certificate	Description and date of instrument, if any, by which the debt is secured
1	Imperial Bank of India Savings Bank Department	Rs 2,500	Under Savings Bank Account Index No 15 (L F. 31) in the name of the deceased
2			

19 NOTICE ISSUED BY THE COURT ON AN APPLICATION FOR A SUCCESSION CERTIFICATE BEING FILED

Notice is hereby given that C D of in the town of claiming to be a son of the abovenamed deceased has presented a petition to this Court for grant of a succession certificate authorising him to realise the debts and credits mentioned in Annexure "B" to the said petition and to receive interest thereon and this Court has fixed the for the hearing of the said petition

Dated the

Sd

Registrar

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